Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

FLORENCE ZSCHACH AND MARYLOU ZSCHACH

Petitioners,

v.

LUCAS PRENDERGAST ALBRIGHT NEWMAN & GIBSON
and
ROBERT E. ALBRIGHT

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals For Franklin County, Ohio

PETITION FOR WRIT OF CERTIORARI

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103 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the trial judge – who in another case had ruled a zoning ordinance to be valid – transgressed Petitioners' constitutional rights to due process of law by failing to disqualify himself from being the fact-finder in a case where Petitioners' claim for relief – not directly, but collaterally – involved the transparent invalidity of the same ordinance by reason of newly discovered fraud.

2. In a case with indisputable political implications, whether Petitioners were deprived of due process of law where a trial judge, in effect, reviewed a decision which *he* – and not some other fact-finder – had previously made in favor of a political group, where Petitioners were not parties in the previous case.

PARTIES TO THE PROCEEDINGS

Petitioners herein are Florence Zschach of Perry Township, Franklin County, Ohio and her daughter, Marylou Zschach of Columbus, Franklin County, Ohio.

Respondents herein are Robert E. Albright of Upper Arlington, Franklin County, Ohio, and his law firm, Lucas Prendergast Albright Newman & Gibson, of Columbus, Ohio.

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The following appear in the Appendices hereto:

A. September 12, 1996 decision of Court of Appeals of Franklin County, Ohio in affirmance of November 30, 1995 judgment of common pleas court, Lazarus, J., dissenting in part;

B. January 15, 1997 Ohio Supreme Court order dismissing Petitioners' discretionary appeal of aforesaid appellate decision, as not involving any substantial constitutional question;

C. February 26, 1997 order of Ohio Supreme Court denying Petitioners' Request for Reconsideration of the aforesaid order;

D. November 30, 1995 entry of Judge Sheward of common pleas court granting Respondents judgment in amount of $30,893.84 with interest from December 1, 1993, dismissing Petitioners' counterclaim, and dismissing Margaret Slone [sic] as a party defendant;

E. November 30, 1995 Sheward findings of fact and conclusions of law supporting judgment entry immediately preceding;

F. October 26, 1994 decision of Judge Sheward, granting Petitioners' motion to join Respondent Robert E. Albright as plaintiff, but denying motion to join themselves so that they could counterclaim as individual defendants, and not merely as trustees;

G. April 25, 1995 Judge Sheward's decision and entry denying motion of Petitioners to adjust clerk's original case schedule;

H. April 25, 1995 Judge Sheward's decision and entry denying motion for leave to amend counterclaim to request a jury;

I. July 12, 1995 entry of court of appeals, denying review of the jury question, for lack of final appealable order;

J. August 9, 1995 entry of aforesaid court of appeals denying reconsideration of its prior order;

K. October 11, 1995 Judge Sheward's decision and entry denying Petitioners' motion to dismiss (or transfer) for lack of subject matter jurisdiction;

L. July 30, 1993 Sheward opinion in *Hampton Lane Homeowners Association v. City of Upper Arlington*, Franklin County Common Pleas, 93 CVH 06-4488, unreported. This opinion, although not entered in the case at bar, is the most important of all opinions listed, since anticipatory judgment was formulated therein;

M. Respondent's May 4, 1995 acknowledgment that Sheward does not intend to recuse himself, as orally requested by Petitioners' counsel on April 5, 1995

JURISDICTION

This court's jurisdiction is being invoked under 28 U.S.C. 1257.

On September 12, 1996, the Franklin County Court of Appeals entered judgment against Petitioners. The order

of the Ohio Supreme Court, dismissing discretionary review of this judgment was entered on January 15, 1997. Motion for reconsideration thereof was denied by said Supreme Court on February 26, 1997. This petition for Certiorari is being filed within 90 days of the latter date.

The federal question essentially concerns judicial bias which is a matter of constitutional due process of law. It was first raised on April 5, 1995 when Petitioners' counsel, John F. Heath, orally requested that Judge Richard S. Sheward recuse himself from this particular case and the federal question was decided by his refusal to recuse himself, as admitted by Respondents in Appendix M herein. Further attempts to circumvent the effects of anticipatory judgment are exemplified by Petitioners' request for a jury trial and their motion to dismiss for lack of jurisdiction over the subject matter.

Before the Court of Appeals, (herein the "Petree court") the federal question was expressly raised in Assignment of Error #1, in *his verbis*: "The Court erred in not recusing himself from this case." Judicial impartiality is an ingredient of due process of law and according to Canon 3(C)(1) of the Ohio Code of Judicial Conduct a judge *must* recuse himself if his impartiality is reasonably questioned. The federal question was also implicitly raised in Assignments of Error #2, #3, #4, #5, #10 and #13, insofar as the assigned abuse of discretion was the result of judicial bias.

As to Assignment of Error #1, the Petree court was silent as to whether Sheward erred in not recusing himself from the case. Petree did remark, however, that only

the Chief Justice of the Ohio Supreme Court could mandate disqualification. As to other assignments of error, the Petree Court held there was no harmful abuse of discretion.

CONSTITUTIONAL PROVISIONS

I. Fifth Amendment to the United States Constitution.

II. Section 1 of the Fourteenth Amendment to said Constitution.

STATEMENT OF THE CASE

Rule 10 of this court cautions that a petition for a writ of certiorari is rarely granted when the error is asserted to consist in erroneous factual findings. However, if it becomes clearly evident that a fact-finder does not have a passion for the truth in a particular case, then fiction is perpetuated each time a reviewing court defers to the so-called discretion of the fact-finder. The manifest weight of the evidence establishes such judicial bias in the case at bar as to have deprived Petitioners of due process of law. Therefore, it is necessary to recite the events in some detail, so that the Supreme Court can perceive that the circumstances herein really present a legal issue.

In 1992 CompuServe, Inc. (herein "CompuServe"), a computer firm, had its principal place of business in the City of Upper Arlington. It employed about 1,000 workers and was responsible for 20% of the tax revenue of this city of 35,000 persons, the most populous suburb

of Columbus, Ohio. The firm was growing rapidly and needed room for expansion. If it expanded inside Upper Arlington it would result in $244,000 additional taxes by the year 1996 and by the year 2010 an additional $2.3 million. The nearby city of Hilliard was also aware of this growth and its mayor was ready to give "the sun, the moon, & the stars" in order to snatch CompuServe away from Upper Arlington. CompuServe officials were delighted with this municipal rivalry.

A dilemma existed for Upper Arlington, since no suitable room existed for CompuServe to expand within the city. However, in adjoining Perry Township twenty-nine acres of real estate were being offered for sale to residential bidders, one of whom – Summit Properties, Inc. of Charlotte, North Carolina – had offered $3 million. It was owned by the Clara Wirthman Trust. Trustees were Petitioner Florence Zschach and her two daughters, Petitioner Marylou Zschach and Margaret Ann Sloan. Marylou Zschach (hereafter "Marylou") was the spokesperson for the trust in the negotiations for sale.

Attorney Robert E. Albright (hereafter "Albright"), who dealt with municipalities "all the time" during his forty plus years as a lawyer, was engaged by Upper Arlington to persuade the trustees to tender their land to CompuServe. He gained their confidence by boasting about his reputation for preventing commercial use of land and then, after being hired by them, double-crossed them into signing a contract with CompuServe. Contract terms required annexation into Upper Arlington, followed by rezoning of the land for commercial use. Later, through the efforts of Attorney Dan Gunsett Petitioners established that the contract had lapsed by its own terms.

However, great damage had been done to Petitioners, since the city refuses to re-zone the land back to residential use. In the meantime CompuServe received an irresistible offer from Hilliard and relocated in that city. Seething with rage, Upper Arlington officials have resolved that the land will have no value to Petitioners, unless it is sold to a commercial entity producing revenue for the city, or condemned for that purpose.

Albright's single-minded aim and purpose had been to get CompuServe committed to Petitioners land before it went to Hilliard. That would have been splendid, had Petitioners wanted a commercial entity on their land; but it was important that the elderly Zschachs dwelt in comfort and according to their accustomed manner of living in a quiet residential neighborhood. Florence Zschach had been there for sixty-one years. By thus compelling the CompuServe contract, Albright betrayed trustees. He became an independent tortfeasor, his outrageous conduct completely severing the attorney-client relationship.

Compuserve made an offer for the land in July 1992, but the trustees never responded, since they wanted residential developers. Realizing Marylou's ardent love for her parents and their welfare, Albright used imminent danger to her parents as an incentive to negotiate with CompuServe. In early November 1992 he startled her with the news that there would be a midnight city council meeting that very day to condemn the land and that in thirty days her parents would be "thrown out on to the street." He summoned Marylou first to the city office for discussion. Later at his office and in her presence he phoned some pretended Upper Arlington "official" and received the assurance, so he said, that city council might

cancel the midnight meeting, if Marylou immediately negotiated with CompuServe. *This was a lie.* Albright knew that there was no "midnight meeting" and no danger of condemnation or eviction, near or distant.

Marylou, trustfully looking to Albright for advice and not realizing that he was engaged in exquisite "play-acting", produced a counteroffer.

In his findings of fact (Appendix E), without explaining *why*, Judge Sheward, regarded the following account of those November 1992 events as "not credible." Marylou testified:

> "I was at my office, and Bob called me and he told me that I had to get – to get over to the city office again, and I had to get there right now. And I said, 'I can't. I'm working. I'm doing something very important. I just can't walk out of here.' . . . And so when I told him I wasn't going to go, that they need to make an appointment or something because I was doing something, I just couldn't walk out. I have a job. And he said, 'Well, you have to go, because they're going to have an emergency midnight meeting to condemn your parents' property and home tonight.' "
>
> ". . . . I said, 'Bob, they can't do that. We're not even in Arlington.'. . . . He said 'Oh yes, they can, hell, yes, they can.' . . . I left my office. When somebody calls you and tells you they're going to take your land away by eminent domain by midnight, you make an excuse. You get out of there . . . "
>
> "I met Mr Albright in the lobby, and he said that we had to talk with Sharon Pfancuff, who is

> the city attorney, who I had never met prior to that time. And he said that we had to go talk to her and we had to talk quick, you know, because all this was coming down, and that she and Richard King were trying desperately to hold the city council off of this."
>
> "Well, I was in tears, I kept saying, 'I can't believe they can do this. I can't believe they can do this.' And he kept saying, 'They're going to do it, baby, You better move it. You got to get into this contract and you got to do it now.' " " . . . I was crying and I was saying,' They can't do this. They can't do this.' He said give my parents 30 days to get out of the property if they took it by eminent domain. I kept saying, 'I cannot believe they can do this.' And he said, 'You were just talking to the city attorney. They can do it and they're going to do it, and you don't care about your parents' " (November 6, 1995 Trial Transcript Pages 189-192).

In his findings of fact Judge Sheward failed to note that witness James Graham also heard Albright's reference to "*that* meeting."

As negotiations proceeded and offers went back and forth, Petitioners still expressed great reluctance to finalize a contract with CompuServe. Albright persevered in the deception by saying: "We've got to appease the city, by making counteroffers to CompuServe. Later on, we can get out of it and begin to deal again with the old bidders. Right now we just want to keep your folks from being evicted." He pounded on the table to emphasize how serious the danger was to the elder Zschachs.

Several months after trustees signed the contract Marylou was discussing with Albright certain terms of the contract. She reminded him that she only signed the contract for fear of the eviction of her parents. Thereupon, Albright categorically denied that there had ever been threats of eviction and insisted to her that she had lost her mind. This was Marylou's first inkling that she had been duped. Later on, in a telephone conversation (which Marylou had prudently recorded) Albright, caught off guard, admitted that she had indeed been duped.

In May 1993 Marylou, as spokesman for the trust, orally terminated Albright, but he refused to go, stating: "This deal is going to go through with or without you", thereby showing his utter contempt for his obligation to represent Petitioners' interests. In order to paralyze her – a lay person – from taking any resolute action, he threatened to go to Probate Court to remove her and her mother, Florence Zschach, as trustees. This maneuver had the added effect of creating a division among the three trustees, inasmuch as trustee Sloan now obtained her own personal counsel.

At trial Albright's counsel attempted to demonstrate that Marylou was litigious and contentious and that she "shopped around" for lawyers, intimating that she had created the lawsuit. However, she was battling, not only Albright, but a powerful Ohio city whose officials were inflexibly determined that her parents' land existed primarily for the purpose of municipal revenue.

She finally found Attorney Gunsett of the Columbus firm of Baker & Hostetler, who duly established that the

CompuServe contract had lapsed by its own terms. This succeeded in stopping Albright. Then in November 1993 all three trustees asked him to return their client files in order that they might resume their attempts to sell the property to residential bidders hopeful that it was still possible, despite the change in zoning. Contrary to Ethical Consideration 2-31 of the Ohio Code of Professional Responsibility, Albright refused. Eighteen months later, upon demand of Petitioners' trial attorney, Albright admitted a possible ethical violation and yielded up the files. The admission of that possible code violation was a new fact, not previously pleaded by Petitioners, and in a supplemental pleading to Judge Sheward was made the basis of a jury demand.

After Lucas Prendergast Albright Gibson & Newman filed their fee suit in August 1994, the firm challenged Petitioners' attempt to join Albright as a "New Party Plaintiff." The firm averred that his wrongdoing, if any, had nothing to do with the firm's right to a fee. In point of fact, the fee suit (and everything connected with it, such as Albright's later move to foreclose on the judgment lien) was simply a subterfuge created to give the impression that Albright really was Petitioners' attorney and to dispel the infamy of his traitorous conduct. *The subterfuge was the main point of the fee suit.* The firm's attempt to exonerate Albright from personal liability on the counterclaim was only an afterthought.

In a bench trial before Judge Sheward in July 1993 Albright had been counsel for Upper Arlington in resisting the attempt by Hampton Lane Homeowners Association (hereinafter "*Homeowners*") to nullify and make void the zoning ordinance which had been enacted pursuant

to Petitioners' contract with CompuServe. In his decision Sheward wrote that there was conflicting evidence on the constitutionality of said ordinance. He properly held that legislative constitutionality is presumed and that *Homeowners* did not produce evidence sufficient to overcome this presumption (See Appendix L).

However, the reason that *Homeowners* did not meet this burden was that Albright, having learned that *Homeowners* had issued a subpoena for Marylou's testimony, warned her under threat of dire consequences (*"if you testify you'll be in violation of the contract and CompuServe will get the property for nothing, etc., etc."*) to avoid service thereof. If Marylou had testified, *Homeowners* would certainly have overcome the presumption of constitutionality, since the zoning ordinance was authorized pursuant to the contractual terms. If the negotiations with CompuServe were not voluntary, then there would be no valid contract, as Albright's counsel admitted in the fee suit.

When the fee suit was assigned to Judge Sheward, himself a citizen of Upper Arlington, a question arose as to his impartiality inasmuch as: (1) he had already formed an opinion on the validity of the zoning ordinance, and (2) having upheld Albright's position in *Hampton Land Homeowners Association v. Upper Arlington*, he now had Albright before him as a *party* seeking an attorney fee for legal work which involved, inter alia, formulating the same zoning ordinance which he had declared to be valid.

From the start it appeared that judicial economy and the rules of superintendence were far more important

than Petitioners' rights. Since their counterclaim involved a professional tort, with testimony expected of thirty witnesses (See Appendix O), the case should have been on a two-year track pursuant to his own Local Rule 37.03. They asked for an adjustment of the trial date, but he left the case on the one-year track, writing: "This is not complex litigation, and counsel's inability to focus on the issues presented is not a reason for a continuance." (See Appendix G)

Although Petitioners did not file an affidavit of prejudice with the Chief Justice pursuant to Ohio Revised Code Section 2701.03, they did everything else possible to obtain a trier of fact, other than Sheward. They orally sought his personal recusal which he refused. They pleaded a new fact which under Ohio law unquestionably revived the right to a jury trial. They appealed Sheward's denial thereof to the Franklin County Court of Appeals. They attempted to remove the case to Probate Court.

At a status conference, Petitioners' counsel John F. Heath asked Judge Sheward to soften his stance and to give a full hearing. His reply was that counsel could not focus on the issues. Sheward maintained that CompuServe and Upper Arlington were not issues in the case, even though they were prospective beneficiaries of Albright's interference with advantageous relations, which interference Petitioners had counterclaimed. For him, this case was the "easiest case known to man. It didn't need a jury. It was a 'no-brainer' "

Although his own Local Rule 23.02 permits a party (not a non-party) to be recalled to testify to *additional*

facts, he ignored the rule. He could have allowed Marylou to refresh her recollection by looking at her notes without committing harmful error. His conclusions of law were silent on the tort of "interference", apparently adopting Respondents' rule of law that an attorney has a *carte blanche* to interfere with his clients' previous advantageous relations. Petitioners articulately pleaded intentional infliction of mental disturbance, but Sheward ruled that Albright's activities allegedly in support of an attorney fee could not, in truth, be activities procedurally compelling a counterclaim in tort.

Most inappropriately Judge Sheward refused to listen to the phone audiotape wherein Albright admitted that Marylou had been duped. Sheward refused its admission ostensibly because it was not offered at the proper time; whereas in his discretion he could have admitted it at any time in furtherance of justice, pursuant to Ohio Revised Code Section 2315.01(D). At the close of the trial, as if eager and anxious to vindicate Albright and censure Petitioners, Sheward immediately announced his decision from the bench. In view of his unwillingness to hear dispositive proof of Albright's lie, his later ghost-written finding that Marylou's testimony on that point was not credible was a very unjust and wicked finding.

Whether proof of emotional disturbance was effectively foreclosed by Sheward's order of October 26, 1994 refusing to join Petitioners *as individual defendants* or whether it was still hypothetically available to Petitioners *as trustees*, at the end of the first day of trial (as noted by Judge Cynthia Lazarus in her dissent) Sheward, undersigned counsel, and Respondents' counsel all agreed that emotional distress was not a triable issue. Based on the October 26, 1994 order, Petitioners' counsel never

attempted to obtain expert medical testimony on the issue of emotional disturbance. Yet in the face of this understanding by the key figures, the appellate majority ruled that emotional disturbance *was* a triable issue.

Injudiciously, Judge Petree further remarked: " . . . there is no explanation as to how the case might be harmed or prejudiced by a failure to have the case tried to a jury." An appellate judge did not perceive what had happened!! *The facts speak for themselves.* There is no need for an explanation. The evidence recited herein and supported by the record is brim full of the harm that resulted from the bench trial before a biased decision-maker.

REASON FOR GRANTING THE WRIT:

I.

IT IS A DENIAL OF DUE PROCESS FOR A JUDGE NOT TO DISQUALIFY HIMSELF FROM BEING THE FACTFINDER IN A SUIT INVOLVING THE CLAIM OF AN ATTORNEY FEE WHERE THE BASIS FOR THE FEE, IN PART, WAS LEGAL WORK PERFORMED IN FORMULATING A ZONING ORDINANCE WHICH ORDINANCE THE JUDGE HAD PREVIOUSLY HELD TO BE VALIDLY ENACTED, WHERE THE DEFENSE TO THE FEE CLAIM AND THE BASIS OF PETITIONERS' COUNTERCLAIM WAS THE INVALIDITY OF SAID ORDINANCE BY REASON OF NEWLY DISCOVERED FRAUD AND DECEIT ON THE PART OF THE ATTORNEY WHO OBTAINED FROM PETITIONERS THE CONTRACT AUTHORIZING ANNEXATION OF THE LAND AND THE ZONING THAT FOLLOWED.

The right to an impartial decision-maker is required by constitutional due process of law (*Arnett v. Kennedy*

(1973) 416 U.S. 134, 197, 40 L Ed 2d 15, 94 S.Ct. 1633). A biased decision-maker is constitutionally unacceptable in the United States of America and our system of law has always endeavored to prevent the probability of unfairness (*Withrow v. Larkin* (1975) 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L Ed 2d 712). There is no probability of unfairness where the biasing influence is remote and insubstantial. *Aetna Life Insurance Co. v. Lavoie* (1986) 475 U.S. 813. This influence is not insubstantial when the trier of fact pre-judges the evidence and says how he would assess evidence he has not yet seen or heard (*Allen v. Cuomo* (1996) 100 F3d 253, 259).

In addition to personal interest in the outcome of the suit (*Goldberg v. Kelly,* (1970) 397 U.S. 254, 271), a mind closed to the facts is not admissible in a judge (*Gibson v. Berryhill* (1973) 411 U.S. 564, 93 S.Ct. 1689, 36 L Ed 2d 488). Neither should a judge possess an unconscious motive for punishing somebody for exercising or not exercising the constitutional right to enter into a contract, as if that right demanded that some benefit be tendered to the government in exchange therefor (*Nollan v. California Coastal Commissioners,* (1987) 483 U.S. 825, 841, 9 L Ed 2d 677). Judge Sheward's award of $30,893.84 to Albright, unpretentiously, was *his* punishment to Petitioners for "preventing" CompuServe from being a source of revenue for Upper Arlington. His finding that Petitioners (Trustee Florence Zschach and Trustee Marylou Zschach) were personally liable in Respondents' fee suit against the three trustees, *but not Trustee Sloan* (who did not join in the compulsory counterclaim) was simply a retaliatory denial of equal protection of the law.

In prior arguments to reviewing courts, Respondents' "bombshell" has always been: "Judge Sheward found the facts to be different from what Petitioners say they are", not that there were any patent inconsistencies in *their* evidence. Judge Sheward named none. Essentially, his judgment for Respondents and against Petitioners is founded simply on his determination, on some unarticulated basis, not to believe them. Indeed, from the consideration of the evidence summarized herein, from the pleadings and motions, from the events before and during trial, there is no question but that Judge Sheward was determined to find in favor of Albright as a party, just as he found in his favor as counsel in *Hampton Lane Homeowners Association v. Upper Arlington.*

II.

IN A CASE WITH INDISPUTABLE POLITICAL IMPLICATIONS, PETITIONERS WERE DEPRIVED OF DUE PROCESS OF LAW WHERE OVER THEIR OBJECTION A TRIAL JUDGE, IN EFFECT, REVIEWED A DECISION WHICH HE – AND NOT SOME OTHER FACT-FINDER – HAD PREVIOUSLY MADE IN FAVOR OF A POLITICAL GROUP WHERE PETITIONERS WERE NOT PARTIES TO THE PREVIOUS CASE.

Tangentially, Petitioners were before the common pleas court seeking re-examination and review of the zoning ordinance because of *fraud in the inducement* which fraud, as a general rule, nullifies and makes void any engagements, commitments and obligations – whether contractual or not.

Federal judges who have moved up to the circuit court of appeals are not permitted to review rulings previously made by them in the district court (*Delaney v. United States*

(1924) 263 U.S. 586, 44 S.Ct. 206, 68 L Ed 462). The federal judicial code prohibits this because any sincere person is naturally motivated to uphold his own conclusions even in the face of resourceful, but not dispositive, legal argument. Federal law prohibits such review, even if the parties consent (*Cramp & Sons v. International C.M.T.* (1913) 228 U.S. 645, 57 L Ed 1003, 33 S.Ct. 722).

United States v. Giorgi ((1988) 840 F2d 1022, 1st Circ.) held that facts learned by a judge while acting in his judicial capacity cannot serve as a basis for disqualification for bias. However, in 1994 this United States Supreme Court ruled that pre-judgment of the facts need not in all cases have an extrajudicial source in order to establish bias; *the important thing is the predisposition of the judge* (*Liteky v. United States*, 114 S.Ct. 1147, 127 L Ed 2d 474). If the predisposition of the judge is so extreme as to display a clear inability to render a fair judgment, then it is transformed into the "pervasive bias" exception to the extrajudicial source doctrine set forth in 28 U.S.C.A. 144 and 455. Counsel submits, on the ground of constitutional due process of law, that this reasoning also applies to state judges.

Judges are to be independent and to be able to decide cases, oblivious to consequences, either favorable or unfavorable (*Pierson v. Ray* (1967) 386 U.S. 547, 554, 87 S.Ct. 1213, 18 L Ed 2d 288; *Evans v. Gore* (1920) 253 U.S. 245, 251. Imagine an arbiter in the position of Judge Sheward. Here is a young jurist, with less than ten years tenure as a judge, a citizen of a city which lost their chief tax revenue source. He is asked to pass upon a fee request of a lawyer who has been dealing with municipalities "all the time" for over forty years. This lawyer was the

acknowledged protagonist of the so-called contract with CompuServe, the annexation which followed, and the zoning ordinance which he championed before Sheward in *Hampton Lane Homeowners Association*.

If this arbiter's findings of fact cannot be completely disassociated with his feelings – if he cannot keep an open mind as to Petitioners' claim of fraud – constitutional due process of law mandates that he withdraw from the case.

CONCLUSION

A judge's impartiality hinges on whether he was moved to his decision by the evidence before him. That is the question. Was Judge Sheward moved to decision by the evidence before him? Did he have a passion for the truth? Or was he resolved to assess in a certain way evidence which he had not yet seen or heard? The accumulation of evidence of record indicates that he was so resolved. His mind was already made up. This, for example, is why he refused to assess the worth of the phone audiotape recording. The supposed violation of the Rules of Evidence simply gave him an opening.

Judge Sheward had the authority to rule on his own recusal (*United States v. Giorgi*). He thereupon ruled that he need not recuse himself, thus deciding the federal question very early in this litigation. The events that followed demonstrate that, on federal due process grounds, he should have recused himself.

For all of these reasons a writ of certiorari should issue to review the decision and order of the Court of Appeals of Franklin County, Ohio, *and* the decision not to recuse himself made by Trial Judge Richard S. Sheward of the common pleas court of said county.

Respectfully submitted,

JOHN F. HEATH

Record Counsel for Petitioners

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Lucas, Prendergast, Albright, Gibson, & Newman,	:	
Plaintiff-Appellee,	:	No. 95APE12-1663
v.	:	(REGULAR CALENDAR)
Florence Zschach and Marylou Zschach, aka Mary Lou Zschach,	:	
Defendants-Appellants,	:	
Margaret Ann Sloan,	:	
Defendant-Appellee.	:	

OPINION

Rendered on September 12, 1996

Shuler, Plank, Morgan & Brahm, and *Gordon P. Shuler,* for appellee Lucas, Prendergast, Albright, Gibson & Newman

John F. Heath, for appellants.

Emens, Kegler, Brown, Hill & Ritter, and *Anthony C. White,* for appellee Margaret Ann Sloan.

APPEAL from the Franklin County Court of Common Pleas.

PETREE, P.J.

This matter is before this court upon appeal of defendants, Florence and Marylou Zschach ("defendants"), trustees of a testamentary trust created by the will of Clara K. Wirthman, from a judgment of the Franklin County Court of Common Pleas in favor of plaintiff, the law firm of Lucas, Prendergast, Albright, Gibson and Newman, and Robert E. Albright. On appeal, defendants set forth thirteen assignments of error as follows:

> "I. The Court erred in not recusing himself from this case.
>
> "II. The Court erred in refusing to adjust the Clerk's original case schedule with respect to the trial date.
>
> "III. The Court erred in refusing to add Appellants as parties in their capacity as individuals.
>
> "IV. The Court erred-in not impaneling a jury.
>
> "V. The Court erred in thrice refusing an "ad diem" continuance.
>
> "VI. The Court erred in admitting into evidence self-serving unsworn statements of Albright and others.
>
> "VII. The Court erred in refusing Marylou Zschach to refresh her recollection by referring to her notes.
>
> "VIII. The Court erred in refusing the continuation of the direct testimony of a party, Marylou Zschach.
>
> "IX. The Court erred in striking certain testimony of H. James Graham.

"X. The Court erred in refusing admission into evidence of an audio-tape for impeachment purposes during Marylou's redirect testimony and during her surrebuttal.

"XI. The Court erred in dismissing Margaret Slone from the case.

"XII. Alternatively to Assignment #3, the General Division of the Common Pleas Court lacked 'subject matter' jurisdiction, and so the Court erred in its order of October 11, 1995.

"XIII. The Court's judgment in favor of Appellees is against the manifest weight of the evidence."

On August 25, 1994, plaintiff Lucas, Prendergast, Albright, Gibson & Newman filed a complaint seeking payment in the amount of $30,893.04 plus interest for legal services rendered in connection with the sale a 29-acre parcel of real estate located at 3800 West Henderson Road, Columbus, Ohio. The real estate is held by defendants and Margaret Slone as trustees of a testamentary trust created by the will of Clara K. Wirthman, the mother of defendant Florence Zschach and the grandmother of defendant Marylou Zschach and Margaret Slone.

The clerk of courts prepared a case schedule pursuant to Loc.R. 39.01 of the Franklin County Court of Common Pleas at the time plaintiff filed its complaint. Pursuant to Loc.R. 37.02, the case was placed on the 12-month primary time track. Accordingly, the trial was scheduled for August 24, 1995.

On September 14, 1994, defendants, *pro se*, responded to plaintiff's complaint by filing an answer and counterclaim. The answer raised the claim of legal malpractice on

the part of Robert E. Albright, a partner in plaintiff law firm, as an affirmative defense. The counterclaim also asserted additional claims for negligent infliction of emotional distress, intentional infliction of emotional distress and defamation. Plaintiff's reply to the counterclaim was filed on October 7, 1994. Trustee Margaret Slone filed a separate answer on September 22, 1994.

On February 1, 1995, John F. Heath entered his appearance as counsel of record for defendants. Approximately three weeks later, on February 24, 1995, counsel for defendants filed a motion, pursuant to Loc.R. 39.04, to amend the clerk's original case schedule, seeking an extension of five months on all the dates set forth in the original case schedule. Plaintiff had no objection to an extension of time for identifying witnesses, but did object to extending the subsequent dates identified in the case schedule, including the August 24, 1995 trial date. The trial court overruled the motion, noting that, while the interim dates were "somewhat flexible," the case would remain scheduled for trial on August 24, 1995.

On March 23, 1995, defendants, noting that no jury demand had previously been made by any of the parties in the case, filed a motion requesting leave to amend the prayer for relief contained in the counterclaim to include a claim for punitive damages, and to have that claim determined by a jury. The trial court overruled this motion on the grounds that it was unnecessary to amend the prayer for relief under Civ.R. 54(C). In addition, the trial court determined that defendants had waived the right to a jury trial by failing to make such request in a timely manner. Defendants appealed that decision to this

court. By journal entry dated July 12, 1995, this court dismissed the appeal for lack of a final appealable order.

Thereafter, on August 11, 1995, defendants filed a motion to dismiss contending that the Franklin County Common Pleas Court lacked subject matter jurisdiction over the case and that the case should be transferred to the Probate Division of the Franklin County Court of Common Pleas. While that motion was pending, defendants filed a motion for a continuance. The continuance was granted and trial was rescheduled for November 6, 1995. Thereafter, the trial court overruled defendants' motion to dismiss.

The case was tried to the court on November 6 and 7, 1995. At the conclusion of plaintiff's case, Slone was dismissed as a party defendant. Ultimately, the trial court found in favor of plaintiff on its claim for attorney fees and against defendants on their counterclaim.

At defendants' request, the trial court filed findings of fact and conclusions of law. The court journalized its decision on November 30, 1995.[1] Defendants have timely appealed.

By the first assignment of error, defendants contend that the trial judge erred in not recusing himself from the case. The authority to pass upon the disqualification of a judge of the court of common pleas is vested solely in the Chief Justice of the Ohio Supreme Court or his designee.

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[1] Although the case history from the clerk of courts indicates that the judgment entry was filed on November 10, 1995, this appears to be a misreading of the file-stamp, which indicates that the entry was filed on November 30, 1995.

Beer v. Griffith (1978), 54 Ohio St.2d 440; *Kettering v. Berger* (1982), 4 Ohio App.3d 254, 255; *State v. Dougherty* (1994), 99 Ohio App.3d 265, 268.

R.C. 2701.03 provides the procedure for seeking disqualification and states, in relevant part:

> "When a judge of the court of common pleas is interested in a cause or matter pending before the court, is related to, or has a bias or prejudice either for or against, a party to a matter or cause pending before the court or his counsel, or is otherwise disqualified to sit * * * any party may file an affidavit with the clerk of the supreme court setting forth the fact of the interest, bias, prejudice, or disqualification. * * * "

Thus, a court of appeals is without authority to render a decision with regard to disqualification or to void a trial court's judgment on that basis. *Dougherty* at 269; *State v. Ramos* (1993), 88 Ohio App.3d 394, 398.[2] Accordingly, the first assignment of error is overruled.

By the second assignment of error, defendants argue that the trial court abused its discretion in refusing to amend the case schedule and postpone the trial to a reasonable time, more convenient to defendants. Defendants contend that more time was needed for conducting interviews of and collecting documents from their thirty prospective witnesses.

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[2] Although without jurisdiction to determine disqualification, we note that the record contains no affidavit as required by R.C. 2701.03.

Defendants' motion is essentially a motion for a continuance of the trial date. Loc.R. 39.04 of the Franklin County Court of Common Pleas states:

> "The Trial Judge, either on motion of a party or sua sponte may modify any date in the Case Schedule for good cause and on terms as are just * * * ."

In *Hartt v. Munobe* (1993), 67 Ohio St.3d 3, 9, the Supreme Court of Ohio stated that the decision whether or not to grant a continuance is within the sound discretion of the trial court. An abuse of discretion connotes more than an error of law; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

At the time defendants' motion to amend the case schedule was filed, defendants were not in compliance with the original case schedule, having failed to file an initial disclosure of witnesses. Furthermore, after entering his appearance as counsel of record, defense counsel did not file the motion to amend the case schedule for approximately three weeks. Moreover, at the time the motion was filed, defense counsel still had six months to prepare for trial. Although the trial court refused to continue the trial date, it specifically stated that its ruling on any interim dates was flexible; however, the record reveals that defense counsel failed to request extensions on any of these interim dates, suggesting that counsel did not need additional time to prepare the case. Indeed, the record reflects that defense counsel did not schedule any depositions, nor serve any written discovery requests.

In addition, defendants were subsequently granted a continuance of the trial date to November 6, 1995, which provided defense counsel nearly ten months from the time he entered his appearance as counsel of record to prepare his case. Given defendants' failure to comply with the original case schedule, counsel's failure to request additional extensions of time, and the continuance of the trial for over two and one half months, the trial court did not abuse its discretion in failing to grant defendants' motion to amend the case schedule. Accordingly, defendants' second assignment of error is overruled.

By the third assignment of error, defendants contend that the trial court erred in overruling their motion to join themselves as individual defendants in this action. Although this assignment of error is labeled "Non-Joinder of Appellants as Individuals," defendants essentially argue that the trial court erred in dismissing their claims for intentional infliction of emotional distress, negligent infliction of emotional distress and defamation.

Defendants' counterclaim alleged four causes of action. The first was a claim for legal malpractice. The underlying basis for the legal malpractice claim was alleged to be that plaintiff Albright misrepresented defendants' interests in the sale of the trust property. The second and third causes of action, respectively, were for intentional and negligent infliction of emotional distress. These claims were allegedly based on the matter in which plaintiff Albright treated defendants throughout the course of the legal representation. The fourth cause of action contained in the counterclaim was a claim for

defamation. This claim was based on a newspaper comment allegedly attributed to plaintiff Albright regarding the sale of the trust property. In addition to the answer and counterclaim, defendants filed a motion to join Albright as a plaintiff and to add themselves as individual defendants. By decision and entry dated October 26, 1994, the trial court concluded that defendants could join Albright as a party pursuant to Civ.R. 20. However, the trial court denied the motion to add defendants as individual defendants on the basis that the defendants were acting in their capacity as trustees at the time of the alleged injury. In our view, the trial court's rulings suggest that, although defendants' claims for emotional distress and defamation were to remain as part of the case, joinder of defendants as individuals was unnecessary because they had already filed these claims in their capacity as trustees.

However, during the course of the trial, the trial court and counsel for both parties agreed that the trial court's ruling of October 26, 1994 removed defendants' claims for emotional distress and defamation; however, counsel for defendants objected to the trial court's ruling.

It appears that the trial court, as well as all parties to the action, were under the erroneous impression that the trial court's October 26, 1994 ruling removed defendants' claims for emotional distress and defamation from the case. Indeed, the trial court's findings of fact and conclusions of law do not mention any of defendants' claims other than the claim for legal malpractice. As previously noted, our interpretation of the court's ruling is that defendants' individual claims were to remain as part of

the case, but it was unnecessary to add defendants as individual parties.

However, given the nature of the relationship of the parties and the facts as they occurred in this case, we are unable to see how any error made by the trial court caused prejudice to defendants. Given the specific findings made by the trial court, even though it did not rule specifically on the claims for emotional distress and defamation, it is impossible as a matter of law for those claims to have survived the dismissal of this malpractice action.

Defendants' claims for intentional and negligent infliction of emotional distress and defamation were all based solely upon conduct alleged to have occurred during plaintiff Albright's alleged misrepresentation of defendants. Thus, these claims were derivative of defendants' underlying claim for legal malpractice. If Albright's actions did not rise to the level of malpractice, as the emotional distress and defamation arose from that representation, the claims clearly could not survive on their own as pled in this case.

However, we must caution that our analysis of this issue is fact specific to this case. Not in all cases, necessarily, would claims for emotional distress and defamation be derivative of a claim for legal malpractice. However, as the facts and the law are applied to this case, they are derivative. Accordingly, the third assignment of error is overruled.

By the fourth assignment of error, defendants contend that the trial court erred in proceeding to trial without a jury where no affirmative waiver of the right to a jury trial appears in the record.

Civ.R. 38 provides in part:

"**(A) Right preserved.** The right to trial by jury shall be preserved to the parties inviolate.

"**(B) Demand.** Any party may demand a trial by jury on any issue triable of right by a jury by serving upon the other parties a demand therefor at any time after the commencement of the action and not later than fourteen days after the service of the last pleading directed to such issue. * * * "

" * * *

"**(D) Waiver.** The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(D) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

"The failure of a party to timely serve his demand for a jury trial as required by the Civil Rules constitutes a waiver by him of a trial by jury." *Ferguson v. Johnson* (1984), 15 Ohio App.3d 143, 145. After plaintiff filed the complaint on August 25, 1994, defendants filed an answer and counterclaim on September 14, 1994. Sloan filed her separate answer on September 22, 1994. Pursuant to Civ.R. 12(A)(2), plaintiff was required to serve a reply to the counterclaim in the answer within twenty-eight days after service of the answer. Plaintiff complied with this requirement when it filed its reply on October 7, 1994. Under the above-quoted provision of Civ.R. 38(B), defendants would have had fourteen days thereafter, or until October 21, 1994, to demand a trial by jury. No such demand was made during this time, nor had any of the

aforementioned pleadings contained a jury demand. Thus, pursuant to Civ.R. 38(D), defendants' right to a jury trial was waived. However, some five months later, defendants filed a motion for leave to amend their counterclaim to include a claim for punitive damages and to have that claim heard by a jury.

Defendants first argue that their failure to timely demand a jury trial should be excused because they filed their answer and counterclaim *pro se* and did not realize that a jury demand should have been included in the pleading. Defendants' argument is without merit. As noted in *Meyers v. First Natl. Bank* (1981), 3 Ohio App.3d 209:

> "Appellants' argument that as *pro se* civil litigants they should receive special consideration and not be bound by the same rules as civil litigants represented by counsel is against the weight of Ohio as well as national authority. *Pro se* civil litigants are bound by the same rules and procedures as those litigants who retain counsel. They are not to be accorded greater rights and must accept the results of their own mistakes and errors." *Id.* at 210.

Thus, we conclude that defendants, even though *pro se*, were bound by the procedural requirements set forth in Civ.R. 38(B), and were required to demand a jury trial within fourteen days after service of plaintiff's reply to the counterclaim. Defendants' failure to do so constitutes a waiver of their right to a jury trial.

Defendants next argue that, because their amended counterclaim set forth a new issue of material fact, their right to a jury trial was revived. We disagree.

Where new jury issues are created by amendment, a party may properly demand a jury trial. *Ferguson, supra,* at 145. However, an amended pleading which neither changes the nature of the case nor introduces new issues does not renew that right. *Id.* The term "new issues" means "new issues of fact and not new theories of recovery." *id.* citing *Guajardo v. Estelle* (C.A.5, 1978), 580 F.2d 748. When an amendment raises a new issue of law, not of fact, the trial court may properly strike a jury demand. *Knoll Group Mgt. Co. v. Wolfe* (June 28, 1994), Adams App. No. 93CA-553, unreported.

Upon review of defendants' amended counterclaim, we conclude that no new issue of fact was raised. Defendants' proposed amendment sets forth the same cause of action as set forth in the original counterclaim, that is, legal malpractice, albeit in greater detail. The only difference in the amended counterclaim is that defendants now claim that plaintiff's conduct gives rise to a claim for punitive damages, which were not pleaded in the original counterclaim. Defendants claim for punitive damages presents only a "new theory of recovery," not a "new issue of fact." Because it was unnecessary to amend the counterclaim to include a claim for punitive damages under Civ.R. 54(C), the trial court did not err in overruling the motion to amend. (Punitive damages may be awarded even if such damages are not requested, "as long as the total award does not exceed the compensatory request," pursuant to Civ.R. 54[C]. *Lance v. Bowe* (1994), 98 Ohio App.3d 202, 209.) Since defendants' amended pleading did not raise a new issue of fact, the trial court properly struck the jury demand. *Knoll, supra.*

Defendants' final argument under this assignment of error is that even if they did not comply with Civ.R. 38(B), the trial court should have granted their demand for a jury trial pursuant to Civ.R. 39(B).

Civ.R. 39(B) provides:

> **"By the court.** Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues."

Civ.R. 39(B) provides that it is within the trial court's discretion to grant a late demand for a jury trial; thus, this court will not overrule the trial court's decision absent an abuse of that discretion.

The fact that plaintiff would not be prejudiced by a jury trial is not enough to require the trial court to permit defendants' request. *Ferguson v. Strader* (1994), 94 Ohio App.3d 622, 626. Moreover, in *Suburban Community Hosp. v. Lindquist* (Dec. 24, 1980), Cuyahoga App. No. 42079, unreported (reversed on other grounds, *Suburban Community Hospital v. Linquist* (1982), 69 Ohio St.2d 302), the appellate court upheld a lower court decision denying a motion for a jury trial pursuant to Civ.R. 39(B), noting that the moving party's request merely asserted the presence of excusable inadvertence and oversight, but failed to explain how the absence of a jury would prejudice his case. Marylou Zschach's affidavit, which is attached to defendants' motion, merely reiterates that she was unaware that she was required to demand a jury trial at the time she filed her answer and counterclaim; however,

there is no explanation as to how the case might be harmed or prejudiced by a failure to have the case tried to a jury.

For all the foregoing reasons, we conclude that the trial court's denial of defendants' jury demand did not amount to an abuse of discretion. Defendants' fourth assignment of error is overruled.

By the fifth assignment of error, defendants' contend that the trial court abused its discretion in refusing to grant defendants' request for a continuance during the course of the trial.

At the time of the trial, Marylou Zschach was also involved in an ongoing dispute involving an adoption proceeding. Marylou is the adoptive mother of a child whose biological mother is a person named Nan Barnaby. Defendants obtained a continuance of the trial date from August 24, 1995 to November 6, 1995 based upon an alleged physical altercation between Marylou and Ms. Barnaby.

During the course of the trial, Ms. Barnaby entered the courtroom, sat down and observed the proceedings. A sidebar was held, at which time defense counsel requested that the trial court either remove Ms. Barnaby from the courtroom or continue the trial to a later date. The trial court denied defense counsel's request on the grounds that the trial had already been continued once based on the alleged physical altercation between Marylou and Ms. Barnaby. The trial court also noted that the adoption proceeding is totally unrelated to the instant case. Furthermore, the court noted that Ms. Barnaby had not exhibited any disruptive behavior during the trial

and reserved the right to have her removed should she disrupt the proceedings. In addition, the court indicated that a deputy sheriff would be called to the courtroom for the duration of the proceedings to provide a sense of safety to the parties and witnesses. The court also cited the principle that the legal system in the United States is based upon public access to judicial proceedings.

As previously noted, the decision whether to grant a continuance is left to the sound discretion of the trial court. *Hartt, supra.* Absent an abuse of that discretion, this court will not overrule a trial court's decision. The reasons cited by the trial court in refusing to continue the trial clearly demonstrate that the court's attitude was not unreasonable, arbitrary or unconscionable. *Blakemore, supra.* Thus, we cannot find that the trial court abused its discretion in refusing to continue the trial. Accordingly, the fifth assignment of error is overruled.

By the sixth assignment of error, defendants assert that the trial court erred in admitting "any documents signed by Albright."

During the presentation of plaintiff's case-in-chief, several documents related to plaintiff's representation of defendants were identified and discussed by Albright during his direct testimony. These documents were offered as evidence of the attorney-client relationship and as proof of the services rendered by plaintiff on behalf of defendants. At the conclusion of their case-in-chief, plaintiff's counsel moved to admit these documents into evidence. Defense counsel objected to the admission of "any documents that have been signed by Mr. Albright, except those which I have offered into evidence * * * " on the

basis that the documents contained "self-serving statements."

It is well-established that the admission and/or exclusion of evidence rests within the sound discretion of the trial court. Thus, this court will not reverse the trial court, absent a clear and prejudicial abuse of discretion. *O'Brien v. Angley* (1980), 63 Ohio St.2d 159, 153; Evid.R. 403(B).

Defendants argue that the admission of the documents constitutes an abuse of discretion. However, defendants only contend that the documents should not have been admitted because there are "self-serving." However, no challenge was made to the authenticity of the documents and the documents have some relevance to the issue of what services were performed by plaintiff on behalf of defendants. The documents were admissible into evidence; the contention that they are "self-serving" bears upon the weight to be accorded to them by the trier of of fact and not to their admissibility. Thus, we find no abuse of discretion in the admission of the documents. Accordingly, the sixth assignment of error is overruled.

By the seventh assignment of error, defendants contend that the trial court abused its discretion in refusing to allow Marylou Zschach to refresh her recollection by referring to her notes.

Immediately after Marylou began her direct testimony, defense counsel presented her with a document composed of 110 numbered paragraphs, which had previously been prepared by her. Plaintiff's counsel objected on the grounds that the document appeared to be her

prerecorded testimony, rather than a document to be used to refresh her recollection.

Evid.R. 612 states, in pertinent part:

> " * * * [I]f a witness uses a writing to refresh his memory for the purpose of testifying, either: (1) while testifying; or (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing. He is also entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. * * * "

The practice of refreshing a witness' recollection with a writing at trial is well-established in Ohio. Staff Note to Evid.R. 612. Under the doctrine of "present recollection refreshed," the witness "looks at the memorandum to refresh his memory of the events, but then proceeds to testify upon the basis of his present independent knowledge." *State v. Scott* (1972), 31 Ohio St.2d 1, 5-6.

In *Dayton v. Combs* (1993), 94 Ohio App.3d 291, the Second District Court of Appeals discussed the proper circumstances under which a witness may refer to a writing in order to refresh his or her recollection. The court stated:

> "Prior to employing a writing to refresh the recollection of a witness, it must be established that the witness lacks a present recollection of the information or events described in the writing. The propriety of the form of the questions employed to establish this lack of present recollection is largely within the discretion of the trial court. Once the trial court is satisfied that

> the witness has no present recollection of the relevant information or events, the witness is permitted to read the writing silently or have relevant portions thereof read to him. * * * If his recollection has been revived, he may then continue with his testimony." *Id.* at 297-298.

Thus, it is clear that before a writing may be used to refresh a witness's recollection, the memory of the witness must be exhausted, or nearly exhausted. *State v. Price* (1979), 60 Ohio St.2d 136, 139; 1 Gianelli and Snyder, Evidence (1996) 572, Section 612.4. In addition, the extent to which a party may refresh the recollection of its own witness is within the sound discretion of the trial court. *State v. Stearns* (1982), 7 Ohio App.3d 11, 16.

Although defense counsel was clearly entitled to utilize the document to refresh Marylou's recollection, no proper foundation was laid to establish that her memory was exhausted or nearly exhausted. The trial court could not have been satisfied that Marylou had no present recollection of relevant facts or events, as defense counsel asked Marylou to review the document immediately after she took the witness stand and before he asked her a single question. Under these circumstances, we cannot find that the trial court abused its discretion in refusing to allow Marylou to refresh her recollection in this manner. The seventh assignment of error is, therefore, overruled.

By the eighth assignment of error, defendants contend that the trial court abused its discretion in refusing to resume the direct testimony of Marylou Zschach.

It is well-established that a trial court has wide discretion in controlling the orderly progress of a trial. *Blosser v. Carter* (1990), 67 Ohio App.3d 215, 221. Marylou was given ample opportunity to present her direct testimony. Furthermore, it became apparent to the trial court that Marylou's testimony was straying from the relevant issues in the case. As stated in *Blosser*, "the keeping of * * * witnesses, within the just limits of the issues and the competent evidence thereon, and their conduct pertinent thereto, must be left to the sound discretion of the presiding judge." *Id.*, citing *Logan v. Cleveland Ry. Co.* (1923), 107 Ohio St. 211, 222. Moreover, defense counsel voluntarily concluded his questioning. Thus, we are unable to conclude that the trial court abused its discretion in refusing to allow defense counsel to resume the direct testimony of Marylou. Accordingly, the eighth assignment of error is overruled.

By the ninth assignment of error, defendants contend that the trial court abused its discretion in striking portions of James Graham's testimony.

At trial, Graham was asked, based on his own "personal knowledge," if he knew who Albright was representing. Graham responded by stating that Albright was representing Upper Arlington. Counsel for plaintiff objected on the grounds that Graham's further explanation of this testimony actually established that he had no real "personal knowledge" that Albright represented Upper Arlington, and that he had drawn such a conclusion only from the behavior he claims to have witnessed.

Evid. R. 602 states:

> "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. * * * "

Clearly, Graham was not competent to testify as to whether Albright was representing Upper Arlington since there was no foundation laid to establish that Graham had personal knowledge of Albright's relationship with Upper Arlington. Graham's testimony refers only to the behavior exhibited by Albright in his dealings with defendants and that, because of this behavior, he concluded that Albright was representing Upper Arlington. Since Graham's testimony amounted to nothing more than his "belief" that Albright was not representing the interests of the trust, we cannot conclude that the trial court abused its discretion in striking this testimony, especially in light of the fact that this case was tried to the court. Indeed, defendants admit in their brief before this court that "[i]n a non-jury trial, it wasn't unexpected that the court would strike this portion of the testimony."

Moreover, pursuant to Evid.R. 103(A):

> "**Effect of Erroneous Ruling**. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected * * * ."

Given that there was a significant amount of similar testimony offered by defendants to corroborate Graham's testimony and, given that the trial court in ruling against

defendants apparently found such testimony to be incredible, we cannot conclude that the exclusion of Graham's testimony affected defendants' substantial rights. Accordingly, the ninth assignment of error is overruled.

By the tenth assignment of error, defendants contend that the trial court abused its discretion in refusing to admit into evidence an audiotape.

In an attempt to prove their malpractice claim, defendants sought to prove that Albright and Upper Arlington conspired to convince defendants to sell their property to Compuserve. Defendants alleged that as part of this conspiracy, Albright told defendants that Upper Arlington had threatened to "take" defendants' property in an eminent domain proceeding.

During defendants' case-in-chief, Marylou testified that she received a telephone call from Albright on November 5, 1992, demanding that she meet him at the Upper Arlington city offices because Upper Arlington had scheduled an emergency meeting to take defendants' property by eminent domain. Marylou further testified that it was because of this threat that she decided to sell the property to Compuserve rather than allow the property to be taken by Upper Arlington.

Later in her direct testimony, Marylou stated that she had a subsequent telephone conversation with Albright in which he denied that any threat of an eminent domain proceeding had been made. At this end of this testimony, Marylou alluded to having "my own proof" that the

alleged threat had actually been made. However, no further mention was made of the alleged "proof" during the remainder of her direct testimony.

On redirect, defense counsel attempted to introduce into evidence an audiotape of an alleged telephone conversation and requested that the trial court review the tape in camera. However, at this point in the proceedings, no identification was made as to either the participants in or the date of the alleged conversation, nor did defense counsel offer an explanation as to the content of the recording or its relevance to the proceedings. The trial court indicated that it would rule on the admissibility of the tape at a later time.

On rebuttal, counsel for plaintiff called the Upper Arlington City Attorney, Sharon Pfancuff, who testified that the purpose of the November 5, 1992 meeting was to explain to Marylou the annexation process and proposed zoning changes that were set to occur in the near future. Pfancuff denied, however, that any discussion regarding an eminent domain proceeding occurred at this meeting.

Thereafter, defense counsel called Marylou as a surrebuttal witness and again attempted to introduce the audiotape into evidence after identifying the participants as Marylou and Albright and describing the conversation as an admission by Albright that Upper Arlington was threatening defendants with an eminent domain proceeding. However, the date of the telephone conversation was not provided. The trial court refused to admit the tape on surrebuttal on the grounds that defense counsel should have brought it up during defendants' case-in-chief. As

noted previously, the admission and/or exclusion of evidence rests within the sound discretion of the trial court. This court will not reverse the trial court absent a clear and prejudicial abuse of discretion. *O'Brien, supra.*

Defendants argue that the exclusion of the surrebuttal evidence constitutes an abuse of discretion and cite *Phung v. Waste Mgt., Inc.* (1994), 71 Ohio St.3d 408, for the proposition that they have an unconditional right to present surrebuttal evidence. The *Phung* court noted:

> "A party has an unconditional right to present rebuttal testimony on matters which are first addressed in an opponent's case-in-chief and should not be brought in the rebutting party's case-in-chief. See *Katz v. Enzer* (1985), 29 Ohio App.3d 118 * * * ." *Id.* at 410.

The *Phung* court concluded that a party possesses an unconditional right to present rebuttal evidence if: 1) the evidence is not cumulative; 2) the evidence would not be appropriate for one's case-in-chief; and 3) the evidence is first addressed in an opponent's case-in-chief.

Defense counsel's attempt to introduce the audiotape on surrebuttal was inappropriate. The alleged threat of eminent domain was not addressed in plaintiff's case-in-chief; rather it was raised for the first time in defendants' case-in-chief. Marylou testified to the alleged conversation during her direct testimony and alluded to the tape's existence during her testimony; however, for unspecified reasons, defense counsel failed to introduce the audiotape at this time. Defense counsel should have attempted to introduce the tape at this stage in the proceeding in order to support Marylou's claims. Defense counsel's untimely attempt to introduce this evidence cannot now be claimed

an abuse of discretion on the part of the trial court. Accordingly, the tenth assignment of error is overruled.

By the eleventh assignment of error, defendants contend that the trial court erred in dismissing trustee Margaret Sloan as a defendant. At the conclusion of plaintiff's case, counsel for Margaret Sloan moved for dismissal of the claims against her on the grounds that, since plaintiff had presented no evidence to establish that she had retained Albright or the Lucas law firm, she could not be held personally liable for the debts incurred as a result of plaintiff's representation of defendants. Plaintiff's counsel agreed and the trial court sustained the motion. Defense counsel offered no objection at this time.

Subsequently, however, at the conclusion of the trial, defense counsel objected to Slone's dismissal. In *State v. Williams* (1977), 51 Ohio St.2d 112, the Supreme Court of Ohio held:

> "An appellate court need not consider an error which a party complaining of the trial court's judgment could have called, but did not call, to the trial court's attention at a time when such error could have been avoided or corrected by the trial court. (Paragraph one of the syllabus of *State v. Glaros*, 170 Ohio St. 471, approved and followed.)" *Id.* at paragraph one of the syllabus.

This court will not consider defendants' claim of error, as the objection was not made at a time when any alleged error in dismissing Sloan could have been corrected by the trial court. Defense counsel's argument that he was not asked by the trial court at the time the motion was made whether he agreed with Sloan's dismissal is not well-taken. If counsel had any objections to Sloan's

dismissal, he should have raised such objections at the time the motion to dismiss was made, whether asked by the trial court or not, so that Sloan's counsel would have been afforded an opportunity to respond. Accordingly, the eleventh assignment of error is overruled.

By the twelfth assignment of error, defendants contend that the trial court erred in overruling their motion to dismiss for lack of subject matter jurisdiction.

On August 11, 1995, defendants filed a motion to dismiss for lack of subject matter jurisdiction, arguing that the Franklin County Court of Common Pleas, Probate Division, had exclusive jurisdiction over this matter. Plaintiff filed a memorandum contra; the trial court overruled defendants' motion on October 11, 1995.

Thereafter, just prior to opening statements in the trial of this case, defense counsel voluntarily withdrew the motion to dismiss for lack of subject matter jurisdiction. It is well-established that the issue of subject matter jurisdiction cannot be waived and may be raised at any time during the proceedings. *In re Byard* (1996), 74 Ohio St.3d 294, 296. However, having withdrawn their motion, defendants cannot now claim that the trial court erred in overruling the motion. Accordingly, the twelfth assignment of error is overruled.

By the thirteenth assignment of error, defendants contend that the judgment of the trial court is against the manifest weight of the evidence. Specifically, defendants take issue with several of the factual findings made by the trial court. In reviewing this assignment of error, this court must be guided by the presumption that the findings of a trial court are correct, as the trial judge " * * * is

best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony. * * * " *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. Furthermore, "[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279, syllabus.

Defendants first contend that the trial court erred in concluding that they had not proven any damages and that plaintiff's actions were the proximate cause of any damages. However, testimony presented by defendants themselves support the trial court's finding. Specifically, when asked by the court to explain the monetary effect of the loss of the Compuserve contract, Marylou Zschach testified that there was "no financial loss." Thereafter, when asked by defense counsel to describe any monetary damages, *i.e.*, loss of bargains, non-use of the property, attorney fees, etc., incurred as the result of Albright's representation, Marylou responded by stating that the damages were "pretty hypothetical." Thus, defendants' own testimony convinces this court that the trial court did not err in finding that defendants' did not present any competent, credible evidence of damages.

Defendants next challenge the trial court's finding that the ethical violations committed by Albright did not amount to acts of legal malpractice. Defendants' argument is based on the faulty premise that the trial court found that Albright had committed an ethical violation. Contrary to defendants' assertion, the trial court did not

find that Albright had committed any ethical violations. Rather, the trial court merely noted in its findings of fact that defendants' expert witness testified that, in his opinion, Albright had committed an ethical violation during his representation of the trust; however, the trial court went on to find that this testimony was based on alleged facts that were not presented as evidence in the instant case. Thus, since the trial court found that there was no credible evidence to support defendants' assertion that Albright's conduct in representing the trust constituted an ethical violation, we cannot find that the trial court erred in determining that his conduct did not constitute legal malpractice.

Defendants next challenge the trial court's finding that defendants retained new legal counsel with respect to the same matters for which plaintiff was retained. The record contains competent, credible evidence to support this finding. After apparently becoming dissatisfied with the legal services rendered by Albright, defendants retained the legal services of another law firm in connection with the sale of the trust property. Testimony offered by one of the partners of the second law firm established that the firm was retained to evaluate the provisions of the existing contract with Compuserve, to ensure that defendants' interests were protected and to make recommendations regarding available alternatives. The fact that the second law firm was required to provide somewhat different legal services, or even corrective legal services, does not change the fact that defendants' ultimate goal in retaining both law firms was to represent them in the sale of the trust property. Thus, the trial court did not err in

finding that both law firms were retained with respect to the same matters.

Defendants also challenge the trial court's finding that plaintiff's representation of defendants was initiated by defendants. Albright testified that Marylou initially contacted him by telephone regarding the sale of the property. Defendants admit this fact in their brief to this court. At the time of the initial contact, Albright informed defendants that, due to a conflict of interest, he could not represent them. After the conflict was resolved, Albright called defendants and indicated that he could now represent them. Although Albright was not retained until after this second conversation, the fact remains that the initial contact between plaintiff and defendants was made by defendants. Thus, there is competent, credible evidence to support the trial court's finding.

Finally, defendants take issue with the trial court's finding that Albright was not terminated until September 23, 1993. Albright testified that he was terminated by letter dated September 23, 1993, and that he had not been orally terminated prior to that date. Although Marylou testified that she had orally terminated Albright some time earlier, she could not provide the place, time, or date on which the alleged termination occurred. The trial court was not required to accept the testimony of Marylou regarding the termination date. Indeed, the weight to be given evidence and the credibility of witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. Since the record contains competent, credible evidence to support the trial court's finding that Albright was not terminated

until September 23, 1993, we may not reverse the trial court's finding.

Having determined that there is competent, credible evidence to support the trial court's findings, we conclude that the trial court's judgment is not against the manifest weight of the evidence. Accordingly, the thirteenth assignment of error is overruled.

For the foregoing reasons, defendants' assignments of error are overruled and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

CLOSE, J., concurs.

LAZARUS, J., concurs in part and dissents in part.

LAZARUS, J., concurring in part and dissenting in part.

Being unable to agree with the majority opinion as it addresses the third assignment of error, I respectfully dissent from that portion of the majority opinion.

The majority concludes that defendants' claims for intentional and negligent infliction of emotional distress and defamation were derivative of defendants' underlying claim for legal malpractice and, therefore, could not have survived independently.

However, as the majority observed, the transcript of the trial reveals that the trial court, as well as all parties to the action, were under the impression that the defendants' claims for emotional distress and defamation had been severed from this action:

"THE COURT: * * *

"I would like to know, and briefly, before we close for the day, my understanding of this litigation is that Mr. – it's contractual in nature. There's a claim for negligent infliction of emotional distress. I'd like to know how you get that out of a contract.

"MR. SHULER: Your Honor, that claim is not in the case, if you look at the rulings that you made at the time –

"THE COURT: Oh, I did, okay. Well, tell me what is in the case.

"MR. SHULER: As far as we're concerned, our claim for attorney fees and a counterclaim that's based on alleged malpractice. I mean, the malpractice claim is founded largely in what appeared to me to be sort of ethical violation type claims, but malpractice.

"THE COURT: I understand. Okay. " * * *

"MR. HEATH: – we wanted to – initially we wanted to – if the Court will look at its record, we wanted the trustees, especially the 83-year-old Florence Zschach, and Marylou Zschach, to get personal, to sue him personally for damages for intentional infliction of mental disturbance, mainly, you know, this [*sic*] threats, so forth, that make them sick, with malice.

"And the other thing was to sue them for slander, the reports to the press and so forth, but you refused to allow that in the claim, so, you know, that's what I said in the beginning of this hearing that we wanted to reserve our objection on those matters. So right now as the case now

> stands it's true it's not in the case, those personal damages.
>
> "THE COURT: All right. We're adjourned." (Tr. Vol. I, pp. 230-232.)

Thus, I would conclude that because the trial court's rulings concerning defendants' claims for emotional distress and defamation were at best ambiguous, this cause should be remanded to the trial court for proceedings concerning these claims. Because the defendants were denied the opportunity to present their evidence on these claims, it is impossible for this court to know whether those claims were derivative (as assumed by the majority) or not. Accordingly, I would sustain the third assignment of error.

THE SUPREME COURT OF OHIO

85-029

1997 TERM

Lucas, Prendergast, Albright, Gibson & Newman,	:	
Appellee,	:	Case No. 96-2392
v.	:	
Florence Zschach and Marylou Zschach, a.k.a Mary Lou Zschach,	:	ENTRY
Appellants,	:	(Filed Jan. 15, 1997)
Margaret Ann Sloan.	:	

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by John F. Heath.

(Franklin County Court of Appeals; No. 95APE121663)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

THE SUPREME COURT OF OHIO

1997 TERM

Lucas, Prendergast, Albright, Gibson & Newman, Appellee, v. Florence Zschach and Marylou Zschach, a.k.a Mary Lou Zschach, Margaret Ann Sloan, Appellants.	:	Case No. 96-2392 RECONSIDERATION ENTRY (Franklin County) (Filed Feb. 26, 1997)

IT IS ORDERED by the Court that the motion for reconsideration in this case be, and hereby is, denied.

(Court of Appeals No. 95APE121663)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

IN THE COURT OF COMMON PLEAS
OF FRANKLIN COUNTY, OHIO
CIVIL DIVISION

LUCAS, PRENDERGAST, ALBRIGHT, GIBSON & NEWMAN,	)	FINAL APPEALABLE ORDER
PLAINTIFF,	)	CASE NO. 94CVH08-5929
V.	)	
FLORENCE ZSCHACH, ET AL.,	)	JUDGE SHEWARD
DEFENDANTS.	)	

JUDGMENT ENTRY

This action came on for trial before the Court on November 6 and 7, 1995, at which time the issues were duly tried and a decision was duly rendered from the bench. For the reasons stated by the Court in its ruling from the bench, and as set forth in the Findings of Fact and Conclusions of Law filed herein, it is:

ORDERED and ADJUDGED as follows:

I. Plaintiff's claims against Defendant Margaret Ann Slone, Trustee, are dismissed.

II. The counterclaims of Defendants Marylou Zschach, Trustee, and Florence Zschach, Trustee, against Plaintiff Lucas, Prendergast, Albright, Gibson & Newman and Robert E. Albright are dismissed.

III. Judgment is granted in favor of Plaintiff Lucas, Prendergast, Albright, Gibson & Newman against Defendants, Marylou Zschach, Trustee, and Florence Zschach, Trustee, and against Marylou Zschach and Florence Zschach, as Trustees of the Trust created by Item 3 of the

Last Will and Testament of Clara K. Wirthman, Deceased, Case No. 239389, Probate Court of Franklin County, Ohio, in the amount of $30,893.84 with interest thereon at the rate of 10% per annum from December 1, 1993.

IV. Court costs shall be assessed against Defendants Marylou Zschach, Trustee, and Florence Zschach, Trustee.

/s/ Sheward
Judge Sheward

APPROVED.

/s/ Gordon P. Shuler
Gordon P. Shuler (0019315)
SHULER, PLANK, MORGAN & BRAHM
A Legal Professional Association
326 South High Street, Suite 500
Columbus, OH 43215-4510
Attorney for Plaintiff

Submitted by letter dated 11/21/95; telephone discussion 11/27/95. Not approved.
John F. Heath (0022868)
599 Cheshire Road
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Attorney for Defendants
Marylou Zschach, Trustee and Florence Zschach, Trustee

Anthony C. white, per telephone consent 11/27/95.
By: /s/ Anthony C. White
Anthony C. White (0062146)
EMENS, KEGLER, BROWN, HILL & RITTER
65 East State Street, Suite 1800
Columbus, OH 43215-4294
(614) 465-1464
Attorney for Defendant
Margaret Ann Slone, Trustee

IN THE COURT OF COMMON PLEAS
OF FRANKLIN COUNTY, OHIO

LUCAS, PRENDERGAST, ALBRIGHT, GIBSON & NEWMAN,

Plaintiff,

v.

FLORENCE ZSCHACH, et al.

Defendants.

Case No. 94CVH08-5929

Judge Sheward

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The within action came on for trial to the Court on November 6 and 7, 1995, on the Plaintiff's Complaint and the Counterclaim of Defendants Marylou Zschach, Trustee, and Florence Zschach, Trustee. At the conclusion of the trial the Court rendered its decision from the bench in favor of Plaintiff on the Complaint and against said Defendants on their Counterclaim. Counsel for Defendants Marylou Zschach, Trustee and Florence Zschach, Trustee, requested findings of fact and conclusions of law in accordance with Civ.R. 52, and the Court requested that counsel for Plaintiff prepare same. The following Findings of Fact and Conclusions of Law are respectfully submitted in response to that request.

FINDINGS OF FACT

1. Robert E. Albright is an attorney at law, licensed to practice in the State of Ohio, and is a partner in the Plaintiff law firm, Lucas, Prendergast, Albright, Gibson & Newman (The "Lucas Law Firm").

2. Defendants Marylou Zschach, Trustee, and Florence Zschach, Trustee, along with Defendant Margaret Ann Slone, Trustee, are the duly appointed and acting Trustees of the Trust created by Item 3 of the Last Will and Testament of Clara K. Wirthman, Deceased, Case No. 239389, Probate Court of Franklin County, Ohio (the "Trust"). (Defendants' Exhibit 4)

3. Among other provisions, the Trust provides in Item 5 of the Will:

> . . . Said trustee is hereby authorized to administer said trust in such manner as he reasonably deems most advantageous and beneficial to said trust; I hereby authorize said trustee to sell, transfer, lease (irrespective of the duration of the trust) or otherwise dispose of or deal with the trust corpus, or invest, or reinvest, the same, as if he were the absolute legal owner thereof, . . .

4. In early 1992, as a direct result of a telephone call from Defendant Marylou Zschach, Trustee, to Robert E. Albright, which occurred in December, 1991, Robert E. Albright met with Defendants Marylou Zschach, Trustee, and Florence Zschach, Trustee; and, as a result of that meeting, the Lucas Law Firm was retained to represent the interests of the Trust relative to the sale of a certain parcel of property owned by the Trust comprised of approximately 29.5 acres of land located at the northwest corner of Henderson Road and Sawmill Road in Franklin County, Ohio (the "Property").

5. Although there was no written fee agreement between the Lucas Law Firm and the Defendants, the fee agreement was not a contingent fee agreement and the

Defendants Marylou Zschach, Trustee, and Florence Zschach, Trustee, agreed to pay the Lucas Law Firm for the legal services rendered.

6. Beginning in early March, 1992, and concluding in late September, 1993, the Lucas Law Firm provided legal services to the Trust which are generally described in the statement from the Lucas Law Firm to the Trust dated December 1, 1993, and admitted into evidence as Plaintiff's Exhibit 1. The legal services were provided for the benefit of the Trust and in accordance with the oral agreement between the Lucas Law Firm and Defendants Marylou Zschach, Trustee, and Florence Zschach, Trustee.

7. The legal services performed by the Lucas Law Firm were necessary to attempt to accomplish the interests of the Trust related to the sale of the Property; and the amount charged, $30,830.00 for legal services and an additional $63.84 for expenses advanced, totaling $30,893.84, is fair and reasonable.

8. In the summer of 1993, Defendants Marylou Zschach, Trustee, and Florence Zschach, Trustee, retained new counsel, to wit: Michael E. Moritz and the law firm of Baker & Hostetler, with respect to the same matters for which the Lucas Law Firm had previously been retained, and, by letters dated September 23, 1993 (Plaintiff's Exhibit 42), terminated the services of the Lucas Law Firm.

9. On December 1, 1993, the Lucas Law Firm issued its statement for services rendered and expenses advanced (Plaintiff's Exhibit 1) to the Clara K. Wirthman Trust and forwarded the statement to each of the Defendants, Marylou Zschach, Trustee, Florence Zschach,

Trustee, and Margaret Ann Slone, Trustee (Plaintiff's Exhibit 4).

10. No payment has been made to the Lucas Law Firm for the legal services rendered or the expenses advanced.

11. The Lucas Law Firm was not retained by Defendant Margaret Ann Slone.

12. The Defendants offered no credible testimony of any act of legal malpractice on the part of Robert E. Albright or the Lucas Law Firm.

13. Even if Defendants had offered evidence of an act of malpractice on the part of Robert E. Albright or the Lucas Law Firm, the Defendants offered no evidence that any act of Robert E. Albright or the Lucas Law Firm was the proximate cause of any damage to them or the Trust.

14. Even if Defendants had offered evidence of an act of malpractice by Robert E. Albright or the Lucas Law Firm, the Defendants offered no evidence of any damages suffered by them or the Trust.

15. The Defendants offered testimony of one expert witness, John J. Chester, who testified that it was his opinion that Robert E. Albright had committed an ethical violation during his representation of the Trust; however, this expert witness offered no testimony that Robert E. Albright or the Lucas Law Firm committed any act of malpractice. In addition, the testimony of this witness that it was his opinion that Robert E. Albright had committed an ethical violation was based on alleged facts (the testimony of a witness given in a deposition in a separate

case who was not called as a witness in this case) that are not in evidence in this case.

CONCLUSIONS OF LAW

1. The Lucas Law Firm is entitled to recover from the Trust, through Defendants Marylou Zschach, Trustee, Florence Zschach, Trustee, and Margaret Ann Slone, Trustee, the sum of $30,893.84, plus interest at the statutory rate of 10% per annum from December 1, 1993, and is entitled to a judgment in that amount. This conclusion is based upon the oral agreement between the Lucas Law Firm and Defendants Marylou Zschach, Trustee, and Florence Zschach, Trustee, and/or upon quantum meruit.

2. The liability of Defendant, Margaret Ann Slone, Trustee, is limited to the claims made against her as a nominal Trustee of the Trust; and she is entitled to a dismissal of any claims made against her personally.

3. The Lucas Law Firm and Robert E. Albright are entitled to a dismissal of the Counterclaims made against them as a result of the failure of Defendants to produce any credible evidence of any act of malpractice on the part of Robert E. Albright or the Lucas Law Firm; the failure of Defendants to produce any evidence that any act committed by Robert E. Albright or the Lucas Law Firm was the proximate cause of any damage suffered by Defendants or the Trust; and the failure of Defendants to produce any evidence of any damages suffered by Defendants or the Trust.

/s/ Sheward
RICHARD S. SHEWARD,
JUDGE

Copies to:

Gordon P. Shuler
Attorney for Plaintiff

John F. Heath
Attorney for Defendants Marylou Zschach, Trustee, and Florence Zschach, Trustee

Anthony C. White
Attorney for Defendant Margaret Ann Slone, Trustee

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

Lucas, Prendergast, Albright, Gibson & Newman,

Plaintiff,

v.

Case No: 94CVH08-5929
(Sheward, J.)

Florence Zschach, as Trustee of the Trust Created by Item 3 of the Last Will and Testament of Clara K. Wirthman, et al.,

(Filed Oct. 26, 1994)

Defendants.

DECISION AND ENTRY GRANTING IN PART DEFENDANTS' MOTION TO JOIN ROBERT E. ALBRIGHT AS PLAINTIFF AND FLORENCE ZSCHACH, MARYLOU ZSCHACH AS INDIVIDUAL DEFENDANTS, FILED SEPTEMBER 14, 1994

Rendered this 26 day of October, 1994. Sheward, J.

This matter is before the Court upon Defendants' Motion to Join Robert E. Albright as Plaintiff and Florence Zachach, Marylou Zschach as Individual Defendants filed on September 14, 1994, and Plaintiff's Reply to Defendants' Motion to Add Parties.

This is an action commenced by Plaintiff law firm to recover legal fees from Defendants. Defendants Florence Zschach and Marylou Zschach, as Trustees of the Trust Created by Item 3 of the Last Will and Testament of Clara K. Wirthman, seek to assert a counterclaim against Robert E. Albright, one [sic] the partners of Plaintiff law firm,

and have filed this motion to join Robert E. Albright in this action as well as to add Defendants Florence Zschach and Marylou Zschach as individual Defendants.

Plaintiff opposes joinder, arguing that any claims Defendants may have against Robert E. Albright individually, rather than as a partner in the law firm, would have no effect on the claims Plaintiff has asserted against Defendants. Further, Plaintiff claims that Defendants have not demonstrated why their claims must be asserted as individuals rather than as trustees.

Upon consideration of the motion, memorandum, and pleadings, the Court concludes that Defendants may join Robert E. Albright as a party to this action pursuant to Civ.R. 20. It appears that the allegations set forth in Defendants' Counterclaim regarding Robert E. Albright arise out of the "same transaction, occurrence, or succession or series of transactions or occurrences" which provide the basis for Plaintiff's claim against Defendants. Civ.R. 20. Further, Defendants Florence Zschach and Marylou Zschach shall not be added as individual Defendants to the action because they were acting in the capacity of trustees as the time they were allegedly injured by Robert E. Albright.

Accordingly, the Court hereby GRANTS Defendants Florence Zschach and Marylou Zschach's Motion to Join Robert E. Albright as a party Plaintiff in this action and DENIES Defendants' Motion to Join Defendants Florence Zschach and Marylou Zschach as individuals.

SO ORDERED.

/s/ Sheward
RICHARD S. SHEWARD, JUDGE

Copies to:

Stephen H. Dodd
Attorney for Plaintiff

R. Douglas Wrightsel
Attorney for Defendant
Margaret Ann Slone, Trustee

Defendant Pro Se Florence Zschach, Trustee
Defendant Pro Se Marylou Zschach, Trustee

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

Lucas, Prendergast, Albright, Gibson & Newman,

Plaintiff,

v.

Florence Zachach, et al.,

Defendants.

Case No: 94CVH08-5929
(Sheward, J.)

(Filed Apr. 25, 1995)

DECISION AND ENTRY DENYING DEFENDANTS' MOTION TO ADJUST CLERK'S ORIGINAL CASE SCHEDULE FILED FEBRUARY 24, 1995

Rendered this 25 day of April, 1995. Sheward, J.

The matter before the Court at this time is Defendants' Motion for Adjustment of Clerk's Original Case Schedule, Plaintiff's Memorandum in Response, and Defendants' Reply.

The attorneys and the parties should be ready to try this case August 24, 1995. This is not complex litigation, and counsel's inability to focus on the issues presented is not a reason for a continuance. This Court encourages counsel to work together and cooperate in accomplishing discovery, etc. The interim dates are somewhat flexible; however, the trial date is not.

So ordered.

/s/ Sheward
RICHARD S. SHEWARD, JUDGE

Copies to:
Gordon P. Shuler, Attorney for Plaintiff
John F. Heath, Attorney for Defendants Florence Zschach, Trustee, and Mary Lou Zschach, Trustee
R. Douglas Wrightsel, Attorney for Defendant Mary Ann Slone, Trustee

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EXHIBIT C

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

Lucas, Prendergast, Albright, Gibson & Newman,

Plaintiff,

v.

Case No: 94CVH08-5929
(Sheward, J.)

Florence Zachach, et al.,

(Filed Apr. 25, 1995)

Defendants.

DECISION AND ENTRY DENYING DEFENDANTS' MOTION FOR LEAVE TO AMEND COUNTERCLAIM FILED MARCH 23, 1995

Rendered this 25 day of April, 1995. Sheward, J.

This matter comes on for consideration upon Defendants' Motion for Leave to Amend Counterclaim filed March 23, 1995, and a Memorandum Contra filed April 3, 1995. No reply has been filed.

Although Defendants' motion is captioned as a Motion for Leave to Amend Counterclaim, it raises other issues. First, Defendants' motion seeks to add punitive damages without any apparent changes in the claims. The Court agrees with Plaintiff that such an amendment is not necessary pursuant to Civ. R. 54(C) as amended July 1, 1994.

Secondly, Defendants request to amend the Counterclaim by now requesting a jury trial. The last date for a jury demand in accordance with Civ. R. 38(B) was October 21, 1994. Pursuant to Civ. R. 38(D), the right to a jury

trial was waived when no jury demand was filed and served by October 21, 1994. To ask for a jury trial six months later stretches the application of the Civil Rules into non-existence.

So ORDERED.

/s/ Richard S. Sheward
RICHARD S. SHEWARD, JUDGE

Copies to:

Gordon P. Shuler,
Attorney for Plaintiff

John F. Heath
Attorney for Defendants Florence Zschach, Trustee, and Mary Lou Zschach, Trustee
R. Douglas Wrightsel
Attorney for Defendant Mary Ann Slone, Trustee

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Lucas, Prendergast, Albright, Gibson & Newman,	:	
Plaintiffs-Appellees,	:	
v.	:	No. 95APE05-651
Florence Zschach etc., and Marylou Zschach a/k/a Marylou Zschach etc.,	:	94CVH08-5929 (REGULAR CALENDAR)
Defendants-Appellants,	:	(Filed July 12, 1995)
Margaret Ann Sloan etc.,	:	
Defendant-Appellee.	:	

JOURNAL ENTRY OF DISMISSAL

Appellants filed a notice of appeal from the April 25, 1995, decision and entry of the trial court denying appellants' motion to amend their counterclaim and request for a jury trial. Appellees have filed a motion to dismiss this appeal for lack of a final appealable order and appellants have filed a memorandum in opposition to appellees' motion to dismiss. Upon review of the record and the memoranda of the parties, it is clear that the order appealed from does not constitute a final appealable order under R.C. 2505.02 inasmuch as the order neither effectively determines the action and prevents a judgment nor is it an order which affects a substantial right which was made in a special proceeding. *See Polikoff v. Adam* (1993), 67 Ohio St 3d 100. In addition, the trial court did not make a determination that there was no just reason for delay pursuant to Civ.R. 54(B). Accordingly,

appellee's motion to dismiss is granted, and this appeal is hereby *sua sponte* dismissed for lack of a final appealable order.

/s/ John C. Young
Judge John C. Young

/s/ Michael L. Close
Judge Michael L. Close

/s/ Cynthia C. Lazarus
Judge Cynthia C. Lazarus

cc: Gordon P. Shuler
John R. Heath
R. Douglas Wrightsel

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Lucas, Prendergast, Albright, Gibson & Newman,	:	
Plaintiffs-Appellees,	:	No. 95APE05-651
v.	:	(REGULAR CALENDAR)
Florence Zschach etc, and Marylou Zschach a/k/a Marylou Zschach etc.,	:	
Defendants-Appellants,	:	(Filed Aug. 9, 1995)
Margaret Ann Sloan etc.,	:	
Defendant-Appellee.	:	

JOURNAL ENTRY

Appellants' motion for reconsideration is hereby denied for the same reasons set forth in this court's journal entry of dismissal filed July 12, 1995. Contrary to the assertions of appellants, the order appealed from which denied appellants' motion to amend their counterclaim and request for jury trial does not effectively determine the action and prevent a judgment pursuant to R.C. 2505.02.

/s/ John C. Young
Judge John C. Young

/s/ Michael L. Close
Judge Michael L. Close

/s/ Cynthia C. Lazarus
Judge Cynthia C. Lazarus

cc: Gordon P. Shuler
John F. Heath
R. Douglas Wrightsel

IN THE COURT OF COMMON PLEAS
OF FRANKLIN COUNTY, OHIO

LUCAS, PRENDERGAST, ALBRIGHT, GIBSON & NEWMAN,

Plaintiff,

v.

FLORENCE ZSCHACH, ET AL.,

Defendants.

Case No: 94CVH08-5929
(Sheward, J.)

(Filed Oct. 11, 1995)

DECISION DENYING DEFENDANTS' MOTION TO DISMISS OR TRANSFER FOR LACK OF SUBJECT MATTER JURISDICTION FILED AUGUST 11, 1995

Rendered this 11 day of October, 1995. Sheward, J.

This matter is before the Court upon the Motion of Defendants Florence Zschach and Marylou Zschach to Dismiss or Transfer for Lack of Subject Matter Jurisdiction filed August 11, 1995; Plaintiff's Memorandum Contra filed August 16, 1995; and Defendants Zschachs' Reply Memorandum filed August 25, 1995.

The Plaintiff law firm brought this suit to recover more than $30,000 in attorney's fees allegedly owed to it by the Defendants. The Defendants, Florence Zschach, Marylou Zschach, and Margaret Ann Slone are the trustees of a testamentary trust created by Clara K. Wirthman, now deceased. According to the Complaint, the Defendants incurred the legal fees in connection with the Plaintiff's representation of them in their roles as trustees. Defendants Florence Zschach and Marylou Zschach filed a Counterclaim which included allegations

of negligence, negligent infliction of emotional distress, and intentional infliction of emotional distress.

In their Motion, the Defendants argue that R.C. 2101.24(A)(1)(d) and 2101.24(A)(1)(l) give the Probate Division of the Court of Common Pleas exclusive subject matter jurisdiction of settlements of accounts with testamentary trustees. They point out that the Plaintiff filed suit over an account which the Defendants entered into as trustees. Thus, they argue that the probate court has exclusive jurisdiction over this case. They asked the Court to transfer the case from the General Division to the Probate Division or alternatively, dismiss it pursuant to Civ.R. 12(H)(3). The Plaintiff, on the other hand, argues that this Court has subject matter jurisdiction because the language of 2101.24(A)(1)(d) and 2101.24(A)(1)(l) does not reach disputes such as this one.

Civ.R. 12(H)(3) provides that,

> [w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

The Franklin County Court of Appeals has suggested that when a suit over which the Probate Division has exclusive subject matter jurisdiction is improperly filed in the General Division, the court should transfer the action instead of dismissing it. *Siebenthal v. Summers* (1978), 56 Ohio App.2d 168.

The parties to this Motion agree that the issue of subject matter jurisdiction is governed by R.C. 2101.24(A)(1)(d) and 2101.24(A)(1)(l):

> Except as otherwise provided by law, the probate court has exclusive jurisdiction: * * *
>
> > (d) To appoint and remove guardians, conservators, and testamentary trustees, direct and control their conduct, and *settle their accounts;* * * *
> >
> > (l) To direct and control the conduct of fiduciaries and *settle their accounts* * * * .

(Emphasis added.) In dispute is whether the Plaintiff's suit to recover legal fees involves a settlement of the trustees' accounts within the meaning of R.C. 2101.24. The movants would have the Court answer this question in the affirmative. The Plaintiff would have the Court answer it in the negative.

To determine whose interpretation of "settle their accounts" is correct, the Court keeps in mind the purposes of probate courts. The power of a probate court is "strictly limited to matters involving the enhancement or depletion of the estate and distribution of that estate to the proper heirs." Carlin & Schwartz, Ohio Probate Law (1989) 27, Section 5.03.

If this Court were to accept the movants' argument, the Court would transfer to probate court a case that – in its current posture – would have no bearing on the enhancement or depletion of the estate of Clara K. Wirthman and would have no bearing on the distribution of the estate to her heirs. This is because, as the Plaintiff points out in its Memorandum Contra, the Defendant-trustees are personally liable to third persons (like the Plaintiff law firm) on obligations they incurred in administrating the trust. 91 Ohio Jurisprudence 3d (1989) 536,

Trusts, Section 489. Moreover, entities with whom a trustee contracts may recover against the trustees personally or against the trustees' estates, but may not execute the judgment against the trust res. *Id.* at 565, Section 522.

As the Plaintiff points out on page 3 of its Memorandum Contra, "If the Defendants wish to pay the judgment from the trust estate, they will presumably do so and then 'settle their account' with the Probate Court." Then and only then would the action have an effect on the depletion of the estate and the distribution of the estate to the decedent's heirs. If this hypothetical action were to be filed, it would be subject to the exclusive jurisdiction of the Probate Division. R.C. 2101.24(A). Since the pending suit will not have an effect on the decedent's estate, it was properly brought in the General Division of Common Pleas Court.

For the foregoing reasons, the Motion of Defendants Florence Zschach and Marylou Zschach is DENIED.

Counsel for Plaintiff shall prepare an appropriate entry pursuant to Local Rule 25.01.

/s/ Richard S. Sheward
RICHARD S. SHEWARD,
JUDGE

Copies to:

Gordon P. Shuler
Attorney for Plaintiff

R. Douglas Wrightsel and Anthony C. White
Attorney for Defendant Slone

John F. Heath
Attorney for Defendants Florence and Marylou Zschach

IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO

Hampton Lane Homeowners
Association, et al.,

Plaintiffs,

v. CASE NO. 93CVH-06-4487

JUDGE SHEWARD

City of Upper Arlington,
et al.,

Defendants.

DECISION

This matter comes on for consideration upon an Amended Complaint for Injunctive and Declaratory Relief.

Evidence was taken, and briefs were submitted at the hearing held on the issues herein on July 23, 1993.

All parties were present and represented by counsel, and a record was taken.

The issues presented to the Court, in simplest terms, challenge Ordinance No. 81-93 passed by the Upper Arlington City Council on June 28, 1993.

This challenge comes on two fronts: first, whether the passage of this ordinance was a proper exercise of emergency legislation and, second, whether the passage of this ordinance constitutes illegal spot-zoning.

In dealing with the first challenge, the Court notes that Section XIII of the Charter of the City of Upper Arlington provides for temporary or interim legislation,

but does not contain a specific provision for emergency legislation.

The City argues that authority to pass emergency legislation exists pursuant to R.C. 731.30. Plaintiffs argue that R.C. 731.30 is not applicable and that the City is confined to Section XIII of the Charter of the City of Upper Arlington regarding the passage of temporary legislation.

It should be noted that R.C. 731.30 went into effect on October 1, 1953. Its predecessor was G.C. 4227-3. The language of G.C. 4227-3 and R.C. 731.30 are identical except that the former statute refers to city council as "council of such municipal corporation" while the latter statute refers to city council as "legislative authority."

The Ohio Supreme Court has dealt with the issue of emergency legislation passed pursuant to a city charter as well as pursuant to state statute. In *State, ex rel., City of Fostoria v. King* (1950), 154 Ohio St. 213, the legislation at issue was passed in accordance with an Ohio statute, not a city charter. The Court finds persuasive the broad language of Justice Taft in the *King* decision. Justice Taft wrote:

> "The duty and responsibility of determining the emergency and the necessity that a measure go into immediate effect are confided to the legislative branch of government. If the prescribed procedure for enactment thereof is followed, such measure goes into effect immediately upon its passage.' (Quoting *Holcomb, Aud., v. State, ex rel. Coxey,* (1933) 126 Ohio St. 496, paragraph three of the syllabus.)

> It may seem strange to sustain legislation as emergency legislation not subject to referendum, where there is in fact no emergency, or where the reasons given for the necessity for declaring the emergency do not appear to be valid reasons. However, as does Section 4227-3, General Code, provisions for emergency legislation usually safeguard referendum rights by requiring substantially more than a majority vote to enact emergency legislation. The statutory requirement of stating reasons for declaring the emergency is provided only to satisfy voters that their representatives did have valid reasons for the necessity of declaring that the ordinance was an emergency. If there was in fact no emergency or if the reasons give for such necessity are not valid reasons, the voters have an opportunity to take appropriate action in the subsequent election of their representatives. However, the existence of an emergency or the soundness of such reasons is subject to review only by the voters at such a subsequent election of their representatives. They are not subject to review by the courts.

Id. at 220-221.

The Supreme Court of Ohio recently revisited this issue in *State ex rel., Moore v. Abrams* (1991), 62 Ohio St.3d 130. The above language of Justice Taft was quoted in its entirety in *Abrams*. The *Abrams* court was confronted with emergency legislation passed pursuant to a city charter provision.

Plaintiffs herein argue correctly that the *Abrams* decision is based upon compliance with the city charter in question. Plaintiffs further argue that because there is no

emergency legislation authority in the Charter of the City of Upper Arlington and because there is a provision for temporary or interim legislation, the *Abrams* decision does not apply to this case and the City of Upper Arlington cannot avail itself of R.C. 731.30.

This Court rejects Plaintiffs' argument. No authority has been offered which prohibits the City of Upper Arlington from enacting and passing emergency legislation pursuant to R.C. 731.30.

The Supreme Court of Ohio has held the position, as originally stated by Justice Taft in the *King* decision, for 41 years that:

> If there was in fact no emergency or if the reasons given for such necessity are not valid reasons, the voters have an opportunity to take appropriate action in the subsequent election of their representatives. However, the existence of an emergency or the soundness of such reasons is subject to review only by the voters at such a subsequent election of their representatives. They are not subject to review by the courts.

King, supra, at 221. Consequently, the remedy available to the voters of Upper Arlington is at the ballot box in the next City Council election.

For these reasons, the Court finds that Ordinance No. 81-93 is a valid emergency measure.

The second challenge leveled against Ordinance No. 81-93 is that it constitutes illegal spot-zoning.

The issue of spot-zoning was addressed in *Willott v. Village of Beachwood* (1964), 175 Ohio St. 557. The Ohio

Supreme Court considered an area of 80 acres of land and stated simply:

> 'Spot-zoning' refers to the singling out of a lot or a small area for discriminatory or different treatment from that accorded surrounding land which is similar in character.
>
> The area in question here is not a single lot or a small area, but is a large parcel of land, 80 acres in area. Council's action does not fall within the concept of 'spot-zoning'.

Id., at 559.

In the case under consideration, the affected area consists of 33.9 acres of land. There is conflicting testimony regarding whether the reclassification of said area represents spot-zoning.

The question presented here is a question of fact that must be determined in the face of a presumption of validity afforded to Defendants. Said presumption may be refuted by Plaintiffs only by a clear showing that the legislation in question is arbitrary, capricious, and bears no relationship to the general welfare of the community. Plaintiffs have failed to produce sufficient evidence to refute this presumption. At the heart of this issue is the fundamental concept stated repeatedly by the Ohio Supreme Court that one branch of government should not encroach upon the duties and prerogatives of another. 16 American Jurisprudence 2d, Constitutional Law, Section 138.338-339.

When an enactment under attack is a legislative exercise pursuant to the police power, a party opposing such action must demonstrate clear and palpable abuse of that

power in order for a reviewing court to substitute its own judgment for legislative discretion. *Allison v. Toledo* (1919), 99 Ohio St. 416.

Justice O'Neill in *Willotz v. Village of Beachwood* (1964), 175 Ohio St. 557, clearly states the limitations of judicial review of legislative acts:

> The determination of the question of whether regulations prescribed by a zoning ordinance have a real or substantial relation to the public health, safety, morals or general welfare is committed, in the first, instance to the judgment and discretion of the legislative body. Where such a judgment deals with the control of traffic, volume of traffic, burden of traffic, effect upon valuation of property, municipal revenue to be produced for the city, the expense of the improvement, land use consistent with the general welfare and development of the community as a whole, or, in short, where the judgment is concerned with what is beneficial or detrimental to good community planning, it is in the first instance a legislative and not a judicial matter. The legislative, not the judicial, authority is charged with the duty of determining the wisdom of zoning regulations, and the judicial judgment is not to be substituted for the legislative judgment in any case in which the issue or matter is fairly debatable.
>
> Even though the court, on the facts presented, might decide otherwise than did council, so long as the matter is reasonably debatable, the court has no authority to interfere. * * *

Id. at 560.

Based upon the foregoing, the Court concludes that Ordinance No. 81-93 passed June 28, 1993 is a valid emergency measure and is not unconstitutional spot-zoning subject to review by this Court.

Counsel for Defendants shall prepare an appropriate entry pursuant to Local Rule 25.01.

/s/ Richard S. Sheward
RICHARD S. SHEWARD, JUDGE

COPIES TO:

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May 4, 1995

Mr. John F. Heath
Attorney at Law
599 Cheshire Road
Sunbury, OH 43074

RE: *Lucas, Prendergast, Albright, Gibson & Newman v. Florence Zschach, et al.*
Case No. 94CVH08-5929

Dear Mr. Heath:

This letter is a follow-up to our meeting with Judge Sheward on April 5, 1995.

A few days after that meeting with the Judge, I was verbally informed by the Judge's bailiff that Judge Sheward does not intend to recuse himself from this case. I assume that you received the same verbal notification.

At the April 5 meeting, I provided you with copies of a portion of the file maintained by Lucas, Prendergast, Albright, Gibson & Newman relative to that law firm's

prior representation of the Trustees who are the Defendants in this lawsuit, and I promised you that the rest of the file would be copied for you. I am delivering herewith three more large file folders which contain copies of the rest of the files. I believe that you now have copies of all of the documents you have requested.

Finally, I am in receipt of two decisions signed by Judge Sheward and filed on April 25, 1995. I assume that you received copies of both of these decisions. It appears to me that we will proceed with a trial to the Court on August 24, 1995.

I am available at your convenience to cooperate in accomplishing any discovery you may request.

Very truly yours,

/s/ Gordon P. Shuler
Gordon P. Shuler

GPS/td
enclosures
cc: Mr. R. Douglas Wrightsel
Mr. Robert E. Albright

FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jry [sic], except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO

Lucas, Prendergast, Albright,
etc. Plaintiffs

Case # 94 CVH 08-5929

-vs

Florence Zschach, etc. et al,. (Sheward, J.)
Defendants

(Filed Mar. 23, 1995)

DEFENDANT TRUSTEES ZSCHACH INITIAL
DISCLOSURE OF WITNESSES

COME NOW Defendant Counterclaimant Trustees Zschach who by their attorney, John F. Heath, disclose the following as possible witnesses in the above numbered cause:

1. Trustee Florence Zschach, about dealings with Robert E. Albright (hereinafter "Albright").

2. Trustee Marylou Zschach – the same.

3. Trustee Margaret Sloan – witness to Albright's actions. 3A. Mary White, citizen of Upper Arlington (hereinafter the "City") – her personal dealings with Albright and her observation of Albright's fiduciary disloyalty before City Council.

4. Kent Stuckey who signed for CompuServe. Apparently he witnessed Albright's dramatic "strewing" pictures across a table.

5. Frank Forsythe, apparently escrow agent for $120,000 refundable deposit, kept at interest.

6. The news media official (or officials) receiving information from Albright – identity not as yet known.

7. John and Vicky Majors, Mrs. Voelker and other neighbors in vicinity of Wirthman real estate – at neighborhood association meeting it was difficult to tell WHOM Albright was representing.

8. James Graham, real estate consultant and frequent witness of actions of Albright – Will testify as to his extreme behaviour. Also will testify about feasibility of area for commercialization vis-a-vis residential. Also witnessed Albright's statement that "There are people behind this who are very powerful and who don't take 'No' for an answer."

9. Robert Bracco of Northwest Community Gp, who opposed commercialization and was candidate for City Council.

10. The lady who called Marylou Zschach about alleged threats by the City, if she refused to deal with CompuServe.

11. Agent for Summit Properties who apparently was original high residential bidder.

11A. Jerry Swedlow, whom Trustee first contacted in February 1993 to adjudge the so-called CompuServe contract to have lapsed.

12. Jack Chester who requested subpena to be served on Marylou Zschach, in connection w/ proceedings anent zoning etc. He later represented Trustees in matters, intimately related to the case at bar. His professional opinion re Albright's so-called "contract", his definition of "contingent fee", and his professional reaction

to Albright's billing **both** the City and Trustees for his attendance at hearing before Judge Sheward on June 28, 1993. Also why he wanted to depose Richard King on behalf of Hampton Lane Gp.

13. Judith Lubbers, M.D., concerning condition of Florence Zschach on December 7, 1992 after being browbeaten by Albright to sign a document committing her to a contract she did not want, and her condition at other times as a result of Albright's oppressive behaviour and the condition Albright placed her in. Also concerning condition of Marylou Zschach, as a result of Albright's behaviour. This evidence is **not** offered to establish a basis for damages for pain and suffering, but to shed light on duress and the forcefulness of Albright's "persuasion." [Duress can exist without a gun being drawn.]

14. Secretary of Hilliard City Council to produce Compuserve contract to purchase land in Hilliard. (For comparison purposes – as to whether Albright's document met professional standards for a realty sale contract.)

15. Agents for M&I Shottensteins Homes, for Bob Webb, for Kelly & Weiler, for Cipriano, for Crane Plastics, and other previous bidders on Wirthman realty. Also as to whether any further bidding by them was countenanced Albright.

16. James A Rhodes, as to opinion on feasibility of use of said Wirthman realty, and also as to present and past opposition of City officials to the reasonable development of the land.

17. Surveyor A. J. Myers – He surveyed 1 acre, to be set apart for Marylou Zschach in payment for her work in furthering the interests of the Trust. He reported survey results to Albright who never delivered a deed based thereon to Trustees to execute to Zschach.

18. Lisa Griffin, regarding the balloting for annexation. Unsure at this time, whether annexation can be voided.

19. John Allen, President of City Council – Whether Council is willing to re-zone back to "residential" to restore the "status quo", recent zoning of Wirthman property arguably having resulted in taking of said property without just compensation.

19A. Other Council members to testify to Albright's actions

20. Virginia Barney, former mayor, on desire to retain CompuServe in City. Was CompuServe 1/5th of City tax rate base?

20A Charlie Schneider, regarding annexation and all public records anent same.

21. All other bidders on property, details of which were in clients' files retained by Albright.

22. Mr. Sandy Simpson of Ohio Equities who was putting deal together for a buyer, such as a "1031 tax free exchange."

23. Mike Moritz and Daniel Gunset – re legal activities and interviews with Marylou Zschach, if such activities and interviews become relevant

24. Glen Dugger of Ben Hale & Harrison Smith – zoning lawyer of CompuServe.

25. Upper Arlington Zoning Bd Secretary – as to WHY Board changed Wirthman realty from residential to commercial and WHETHER there were any recent precedents for such action. Also whether height of original lighting was limited to 20 feet, and not 35.

26. Murry Cox, President of Compuserve, with respect to bids on Wirthman realty. Did he make any on his own? Did Plaintiffs persuade him to look at Wirthman deal? Dealings with Hilliard?

27. Robert C. Preston, who represented Wirthman Trust in advance of Albright.

28. T. J. Reilly whom Trustees previously sought as counsel. He favored "residential", but now he is on zoning committee and favors "commercial." WHY did he change? Was pressure brought to bear upon him?

29. Secretary of Upper Arlington Community Improvement Corp (CIC) to answer question whether one of principal reasons for CIC's formation was to find and to force a commercial use of the Wirthman realty in opposition to the rights of the owners.

30. Architect Tom Schnell as to final drawings and the "iffiness" of planned construction and breaking of ground.

31. City Attorney Sharon Pfancuff as to her dealings with Albright. Cross-examination as to her threat to condemn their property if Trustees did not sign w/ Compuserve.

32. City Manager Richard King – whether he pays the City's bills. His instructions to Albright during the 1½ years of Albright's representation of Trustees. Whether he was awarded a large bonus for tying up the Wirthman property in order to put it at the disposal of CompuServe, in case they wanted it.

33. Glen Zschach – re. Albright's statements and actions.

34. Witnesses, unknown now, who will be made known to parties, when Trustees discover same.

35. Treatise, "Law of Professional Responsibility", Guttenberg & Snyder. In Columbus Law Library at KFO 76.5 .AG 88 1992.

This list of witnesses is submitted in order to comply with the order of court. Counsel has been involved herein for less than two (2) months. Based on lack of complete knowledge **at this time,** much of what is listed here is tentative. It is not intended as innuendo, but it is done in "privilegio fori."

Listed witnesses can shed light on conflict of interest, loyalty to client, right of client to restrict decision making authority of lawyer, breach of confidences, professional negligence and the positive tort of brazen interference with advantageous business relations and negotiations.

/s/ John F. Heath
JOHN F. HEATH 0022868
599 Cheshire Rd
Sunbury, Ohio 43074
Phone: (614) 965-9697

Trial Attorney for
Defendants Zschach

Certification of Service

On March 23, 1995 by U.S. Mail, first class, postage pre-paid, I mailed a copy of the above document to Gordon P. Shuler, Esq., Suite 500, 326 S. High Street, Columbus, Ohio 43215, Attorney for Plaintiff law firm and for Plaintiff Robert E. Albright individually and a copy to R. Douglas Wrightsel, Esq, Emens, Kegler, Brown, Hill & Ritter, Suite 1800, 65 E. State Street, Columbus, Ohio 43215, Attorney for Defendant Trustee Margaret Ann Slone.

/s/ John F. Heath
JOHN F. HEATH